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## THE ENGLISH REPORTS, 1292-1865.

**T**HE serious problem presented by the multiplicity of reports seems destined to be solved, like most legal problems, piecemeal. Lord Bacon's early plan of systematic revision was revived in modern times under auspices which insured entire success. Lord Westbury's project involved the revision and expurgation of the reports; he proposed "to weed them of decisions that are in contradiction with one another; where there are opposing decisions, to settle those which ought to remain; and to cleanse out and get rid of all matters that are not warranted by the present state of the law, or applicable to the existing condition of society." It must ever be a matter for sincere regret that this great scheme of official revision and correction, under the guidance of such an acute mind, should have failed of accomplishment. Part of this plan is being realized in our own day through private enterprise. In the Revised Reports, edited by Sir Frederick Pollock, we are to have a republication, from the nine hundred volumes of English reports between 1785 and 1865, of all cases that are still of practical utility. Valuable as this series is certain to be, its preparation involves only the exercise of judicious selection, for the original reports during the period covered are, with few exceptions, accurate and reliable. The latest undertaking, in which a beginning has just been made, is a reprint, in one hundred and fifty uniform volumes, of the whole body of English reports from the Year Books to the Term Reports. The work is to be published under the editorial

supervision of an experienced lawyer, with the assistance of a consultative committee comprising among its members three of the most scholarly English judges of the day. If this editorial equipment is not merely nominal, it is inconceivable that it should be organized for the simple purpose of a verbatim reprint. Yet the first volume of the projected series gives little indication of original work beyond the usual cross-references and other purely mechanical helps. If this undertaking shall serve considerations of economy alone, its sponsors will miss a rare opportunity to render a genuine service to legal scholarship. It is curious that while adherence to judicial precedent was unfailingly recognized the preservation of such precedents should have been for centuries in so precarious a state; it is nevertheless a fact that the thoroughly reliable reporters prior to Lord Mansfield's time may be counted upon the fingers of one hand. Still, it is possible to add immensely to the accuracy and value of the early reports by reference to the vast mass of contemporary material now available. Much of this material has been brought to light and published in recent years by royal commission and by the Selden and other learned societies; a large proportion remains in manuscript, but is quite accessible. The extent to which it would be advisable to collate, annotate, and supplement the early reports with reference to these sources of information is a matter upon which opinion will naturally differ, but professional opinion will probably be unanimous in deprecating a reprint of these volumes in their present state without any reference to such opportunities for improvement.

Even the Year Books, which seem to have been, in later years at least, the work of official reporters, are replete with errors, both of commission and omission. Most of them were published after a fashion as early as the sixteenth century; but the lawyers of that day generally took their information at second hand, through the medium of Fitzherbert's Abridgment. The edition now commonly used was printed, with little evidence of care or intelligent supervision, in 1678-79. Through the industry and scholarship of Messrs. Horwood and Pike, who have since published the Year Books of Edward I. and some of Edward II., we are enabled to compare a good edition with a poor one, and the result may be said to justify the labor. Aside from the Norman-French jargon in which they are mostly written, and the consequent difficulty of understanding them aright, the very informal nature of the proceedings which they record is often confusing. In form these reports chronicle a running fire of statement, comment, and criti-

cism between judges and counsel until an issue is finally reached, when the parties are ready for trial. This didactic process often brings out legal conceptions more clearly than the formal Latin record of the settled pleadings and judgment, but the discussion is so informal that it is not always easy to distinguish the disputants. Moreover, the reporters have an unfortunate habit of breaking off abruptly upon the formation of an issue, giving us no intimation of the final disposition of the case. By reference to the voluminous plea rolls and to the register of original writs many of these substantial omissions might be supplied. In the Year Books emphasis is laid upon pleading and technical forms; knowledge of the matters of substance in which we are now most interested is assumed. The plea rolls, on the other hand, often contain the very information which the Year Books omit, for the judgments there recorded often disclose the grounds upon which they are based, and it is only by bringing the two together that anything like a complete report of the case may be obtained. The Year Books close, for some unexplained reason, in the twenty-eighth year of the reign of Henry VIII.; but the reports which follow stand in even greater need of correction and annotation.

From the last Year Book, in 1537, to the year 1865, there were no official reports. This important work was dependent for more than three centuries upon private enterprise. Toward the end of the eighteenth century these private reports become fairly accurate and complete, but the long period from 1537 to 1785 is precariously covered by more than one hundred reporters of various degrees of merit. A few of them, like Plowden, Coke, and Saunders, have long enjoyed an intrinsic authority; others are quite worthless; all are subject to limitations which should never be lost sight of in relying upon their authority as judicial precedents.

During the century following the abandonment of the Year Books private reports multiplied slowly. Down to the time of the Commonwealth the only reports in print, beside certain Year Books, were Plowden, Dyer, Keilway, Benloe and Dalison, the first eleven parts of Coke, Davies, Hobart, and Bellewe's collection from the Year Books. But during the forty years of political strife from the Commonwealth to the Revolution more than fifty volumes of so-called reports were published; twenty-three of them appeared during the short life of the Commonwealth.<sup>1</sup> As a class

<sup>1</sup> The list includes Aleyn, J. Bridgman, Carter, Goldbolt, Gouldsborough, Hetley, Hutton, Keble, Lane, Latch, Ley, March, Noy, Owen, Popham, Saville, Siderfin, Tothill, Winch, beside Anderson, New Benloe, Brownlow, Bulstrode, Calthrop, Carey.

these reports are accurately described by Sir Harbottle Grimston, afterward master of the rolls, in an "Address to the Students of the Common Laws of England," published in 1657:—

"A multitude of flying reports, whose authors were as uncertain as the times when taken, have of late surreptitiously crept forth. We have been entertained with barren and unwarranted products, *infelix folium ex steriles avenae*, which not only tends to the depraving of the first grounds and reason of the young practitioner, who by such false lights are misled, but also to the contempt of divers of our former grave and learned justices, whose honored and revered names have in some of said books been abused and invoked to patronize the indigested crudities of these plagiaries; the wisdom, gravity, and justice of our present justices not deeming or deigning them the least approbation or countenance in any of their courts."

"The press," says the reporter Style in his preface, "hath been very fertile in this our age, and hath brought forth many, if not too many, births of this nature, but how legitimate most of them are let the learned judge. This I am sure of: there is not a father alive to own many of them."

The license of the press prompted the enactment soon after the Restoration of a licensing act, requiring, among other things, that all books concerning the common law of the realm should be printed only upon the special allowance of the lord chancellor or the judges, or by their appointment. This act undoubtedly accounts for the prefatory passports to some of the subsequent reports. There is a significant difference in their phraseology. The Year Books are not only "allowed" by the twelve judges, but also "recommended to all students of the law." Sir Mathew Hale adds to the license for Rolle's reports that they are "very good." While the judges often certify to the learning and skill of the reputed author, they seldom state that they have examined the work, or express any opinion as to its authenticity. At all events this licensing act, which expired in 1692, did not materially improve the standard of reporting; some of the eighteenth century reports are quite as bad as any of their predecessors. "See the inconveniences of these scrambling reports," said Chief Justice Holt in *Slater v. May*,<sup>1</sup> referring to the fourth Modern; "they will make

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Choyce Cases in Chancery, the twelfth and thirteenth parts of Coke, Clayton, Croke, Jenkins, W. Jones, Leonard, Littleton, Maynard's Year Books of Edward I. and Edward II., the first Modern, Moore, Palmer, Rolle, Saunders, Style, Vaughan, and Yelverton. The first group comprises some of the most worthless of all the reports, and few names in the list carry much weight.

<sup>1</sup> 2 Ld. Raymond 1072.



us to appear to posterity for a parcel of blockheads." And the best that the author of the fifth Modern could say of the post-Revolutionary reports was that "though some of them, as Justice Shelley merrily said, might be compared to Banbury cheeses, whose superfluities being pared away there would not be enough left to bait what my Lord Hale called the mouse-trap of the law; yet, to speak still in the language of a judge, 'I think the meanest of them may, like the little birds, add something to the building of the eagle's nest.'"

The most superficial examination of the contents of these volumes reveals the defects which justify such an arraignment. These reports, bearing the names of various judges, sergeants, prothonotaries and lawyers of less character, had their beginnings in every instance in the needs of actual practice. A lawyer would preserve in his common-place book notes of the cases cited by him in an argument, and this would be followed by a memorandum of the case in which they were used. He would also add, from time to time, other cases which he happened to hear or notes of which were shown to him by his professional brethren. If he subsequently attained a judicial station he would of course take notes of the cases argued before him, and, very likely, of cases cited in argument with which he was not already familiar. Such notes were prepared for personal use and without any thought of publication. Their subsequent publication was almost always posthumous. With the exception of Plowden, Coke, Saunders, and a few others, very few of the reports prior to the Revolution were published in the lifetime of their authors. Bulstrode, Cromwell's chief justice of Wales, was the first lawyer after Coke to publish his own reports. Obviously these manuscripts would vary in accuracy and value with the capacity of their authors. The note-book of a reputable judge, containing a report of litigation over which he presided, would possess all the elements of authenticity. But it also happened that lawyers of inferior acquirements, often mere students, employed their leisure in accumulating private collections of cases. Lord Mansfield relates that the reporter Barnardiston often slumbered over his note-book, and wags in the rear would scribble nonsense in it. Whatever the merits of an original manuscript might be, in passing from hand to hand, for the purpose of copying, additions were made by various hands. When, therefore, a manuscript was finally published it would often be difficult, if not impossible, to ascertain how much of it, if any, represented first-hand work. The contents of New Benloe and

Anderson extend over a period of one hundred and thirty years; Owen, Saville, Brownlow, Gouldsborough, Popham, and Lane, from fifty to one hundred years. Down to Hanoverian times the same cases are constantly reported by different persons, sometimes by half a dozen at once. By comparing them some idea may be obtained of the careless and slovenly methods of copying in vogue. For instance, the case of *Clerk v. Day* is reported by Croke,<sup>1</sup> by Owen,<sup>2</sup> by Moore,<sup>3</sup> and is also printed in Rolle's Abridgment; yet Lord Raymond asserts that it is not accurately reported in any of the books named, even as to the names of the parties.<sup>4</sup> Sometimes an author purports to give a case in full; at other times only in part; and to obtain the whole case the scattered fragments must be traced and put together. Thus the leading case of *Manby v. Scott* is reported in a way in Siderfin and in Levinz;<sup>5</sup> the opinion by Sir Orlando Bridgman may be found in Bridgman's collection of his own opinions, Justice Hyde's in *Modern*, Chief Baron Hale's in Bacon's Abridgment, while parts of the case are scattered through Keble and *Modern*. One reporter will give the decision in the form of an abstract principle, another will state the facts upon which it was founded, a third will report the arguments of counsel, while a fourth may supply parts omitted by the others.

There were, moreover, other elements of confusion. Many manuscripts belonging to lawyers of high standing were published without authority and consequently without any revision. In at least two instances the manuscripts were stolen by servants and published as mere bookseller's speculations, with various additions from unknown sources. At best, posthumous publication, involving the deciphering of a strange manuscript, was attended with serious risks. An original manuscript was apt to be vitiated long before publication by repeated and careless copying. The editor of Dyer's reports refers to numerous errors "religiously preserved and carried on without the least attention to sense." Then many of these volumes are translations of Latin or French originals never published. In cases like Dyer, the first eleven parts of Coke, Yelverton, Saunders, and a few others, where the work was first printed in the original and subsequently translated, we have means of verification. But during the Commonwealth period, English having been made the court language, and reports in Latin and

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<sup>1</sup> Cro. Eliz. 313.

<sup>2</sup> Page 148.

<sup>3</sup> Page 593.

<sup>4</sup> Fitzgibbon 24, 25; Fortescue 77.

<sup>5</sup> 1 Siderfin 109; 1 Levinz 4.

French prohibited, editors at once translated their manuscripts into English. Thus Croke, Winch, Popham, Owen, Leonard, Hetley, J. Bridgman, and some others, though originally written in Latin or French, first appear in English. Considering the cryptographic abbreviations which abounded in the handwriting of former times, the fact that the original manuscript, having been designed for private use, was likely to be filled with symbols understood by the writer alone, and the fact that the translator was exempt from comparison, the probable extent of the errors and imperfections is apparent. "I have taken upon me," says Croke's editor, "the resolution and task of extracting and extricating these reports out of their dark originals, they being written in so small and close a hand that I may truly say they are *folia sybillina*, as difficult as excellent." A score or more of the early reports have never been translated out of the Latin or French in which they were originally published.

The classical repositories of the old common law are the reports of Plowden and Coke. Their work maintained preëminence for more than a century, and exercised a profound influence upon early English law. Plowden was our first private reporter, and in many respects his work has not been surpassed by any of his successors. "The Commentaries or Reports of Edward Plowden of the Inner Temple, An Apprentice of the Common Law," extend from Edward III. to Elizabeth (1550-1580). They are the result of actual attendance in court, and are among the few old reports prepared for the press and published under the direction of their author. Plowden states in his preface, under date of 1571, the circumstances under which the work was undertaken:—

"When I first entered upon the study of the law I resolved upon two things which I then purposed earnestly to pursue. The first was to be present at, and to give diligent attention to, the debates in law, and particularly to the arguments of those who were men of the greatest note and reputation for learning. The second was to commit to writing what I heard, which seemed to me to be much better than to rely upon treacherous memory, which often deceives its master. These two resolutions I pursued effectually by a constant attention at the moots and lectures, and at all places in court and chancery to which I might have access where matters at law were argued and debated. And finding that I reaped much profit and instruction by this practice, I became at last disposed to report the arguments and judgments made and given in the king's courts upon demurrers in law, as abounding more copiously in matters of improvement, and being more capable of affecting the judg-

ment, than arguments on other occasions. Upon this I undertook first one case and then another, by which means I at last accumulated a good volume. And this work I originally entered upon with a view to my own private instruction only, without the least thought or intention of letting it appear in print."

Although often solicited by "some of the judges and other grave and learned men" who had seen his work to allow it to be made public, he modestly declined, "being conscious of the simpleness of his understanding and of the small spark of reason with which he was endued." He was at length led to alter his resolution by the following circumstances :—

"Having lent my said book to a few of my intimate friends, at their special instance and request, and but for a short time, their clerks and others knowing thereof got the books into their hands and made such expedition, by writing day and night, that in a short time they had transcribed a great number of the cases, contrary to my own knowledge and intent, or of those to whom I had lent the book; which copies at last came to the hands of some of the printers, who intended (as I was informed) to make a profit of them by publishing them. But the cases being transcribed by clerks and other ignorant persons who did not perfectly understand the matter, the copies were very corrupt, for in some places a whole line was omitted, and in others one word was put for another, which entirely changed the sense, and again in other places spaces were left where the writers did not understand the words, and divers other errors and defects there were which, if the copies so taken had been printed, would have greatly defaced the work and have been a discredit to me."

Plowden took infinite pains to render his work accurate and complete.

"In almost all of the cases, before they came to be argued, I had copies of the records, and took pains to study the points of law arising thereupon, so that oftentimes I was so much master of them that if I had been put to it I was ready to have argued when the first man began; and by this method I was more prepared to understand and retain the arguments and the causes of the judgments. And besides this, after I had drawn out my report at large, and before I had entered it into my book, I shewed such cases and arguments as seemed to me to be the most difficult and to require the greatest memory, to some of the judges or sergeants who argued in them, in order to have their opinion of the sincerity and truth of the report, which, being perused by them, I entered it into my book."

The result of such care is a report which presents with absolute clearness the points at issue, the arguments urged by the respec-

tive counsel, and the grounds of the judgment rendered by the court. Moreover, in publishing his work he placed a title at the head of each case, together with the date, the nature of the action, the names of the parties, etc. Beyond their excellent form and arrangement the great authority of Plowden's cases has a substantial basis. Many of the early reports, particularly the Year Books, contain the off-hand opinions of the judges upon motions; whereas all of Plowden's cases are "upon points of law tried and debated upon demurrers or special verdicts, copies whereof were delivered to the judges, who studied and considered them, and after mature deliberation gave judgment thereon." This fact also explains the great esteem in which Plowden's work has always been held as a book of entries.

Although Plowden called his work a commentary he was sparing in comment. When he undertakes a full discussion of a topic<sup>1</sup> he is very instructive; but he is always careful to separate his own views from the opinion of the court. His work is therefore really a report, although called a commentary. It remained for Sir Edward Coke to publish under the title of reports an elaborate commentary, in which the opinion of the court was often edited in accordance with the reporter's personal views.

The estimation in which Coke's reports were held by his contemporaries is indicated by their citation simply as "The Reports." While they were being issued no others appeared, "as it became all the rest of the lawyers to be silent whilst their oracle was speaking."<sup>2</sup> Coke began as early as 1580 to take notes of the legal transactions of the day, perfecting his information during hours of leisure. At length in 1600 he published his first volume, and shortly afterward, while he was attorney-general, the second and third. In 1603 the fourth part appeared, and the fifth about two years later. The remaining six parts were issued between the years 1607 and 1616, while he was successively chief justice of the Common Pleas and the King's Bench. These eleven parts or volumes constituted all that were published during his lifetime, and, apparently, all that were designed for publication. In 1634, however, twenty-one years after his death, a twelfth part was printed, and about three years later the thirteenth and last. These last two parts had been left by Coke in an unfinished state, and are inferior in authority to their predecessors.<sup>3</sup> Beside reports of

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<sup>1</sup> As in his note on equity in *Eyston v. Studd*, ii. 465.

<sup>2</sup> 5 Mod. viii.

<sup>3</sup> Hob. 300; Bulst. preface; 10 B. & C. 275.

cases much more loosely stated than in the prior reports, they contain accounts of conferences in the Privy Council, of consultations among the judges, and notes of legal points in general. The fact that they deal largely with questions of prerogative is probably the reason why they were not published in the author's lifetime. The earlier parts had given offense to James I., who deemed certain doctrines contained therein injurious to his royal authority. Coke's ultimate suspension from judicial office was accompanied by a command to consider and revise his reports, and his "scornful treatment of this order" in reporting only five trivial errors, was one of the reasons given for his subsequent dismissal.

In method Coke's reports are unique. They are not reports at all in the strict sense of the term. He says in his preface that he prepared these reports not merely for citation in court but also for educational purposes; and to a large extent, though just how far it is impossible to say, they contain his own statement of the law. Accordingly, they are much more elaborate than other early reports. Since, to Coke's mind, the art of pleading was the necessary foundation of all accurate knowledge of the common law, the pleadings are fully set out, not only for a proper understanding of the case but for the instruction of students as well. The reasons of the judgment are thrown into the form of general propositions of law, in the exposition of which earlier cases are collected with laborious care. Hence the report of each case forms a treatise on the point at issue. The arrangement of the cases, moreover, is not chronological, but more or less according to subjects.

Coke's reports are therefore summary in character. Without tracing any form of argument, he usually gives a statement of the case, following with the substance of all that was said in argument, and concluding with the resolutions of the court. He describes his method in Calvin's case :<sup>1</sup> —

"And now that I have taken upon myself to make a report of their arguments, I ought to do the same as fully, truly, and sincerely as possibly I can; howbeit, seeing that almost every judge had in the course of his argument a particular method, and I must only hold myself to one, I shall give no just offense to any if I challenge that which of right is due to every reporter, that is, to reduce the sum and effect of all to such a method as, upon consideration had of all the arguments, the reporter himself thinketh to be fittest and clearest for the right understanding of the true reason and causes of the judgment and resolution of the case in question."

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<sup>1</sup> 8 Rep. 4 a.



His method of presenting what was decided is, however, disorderly in the extreme. Throughout all parts of the report, but particularly in giving the resolutions of the judges, his inexhaustible learning breaks forth; "one case is followed by another, quotation leads to quotation, illustration opens to further illustration, and successive inference is made the basis for new conclusion; every part, moreover, being laden with conclusions and exceptions, or protected in a labyrinth of parentheses, until order, precision, and often clearness itself is lost in the perplexing though imposing array." How animating, therefore, is his assurance to the reader that "although he may not, at any one time, reach the meaning of his author, yet at some other time and in some other place his doubts will be cleared."<sup>1</sup>

In connection with his habit of editing the conclusions of the court in accordance with his own views of the law, it may be added that Coke is not always accurate. Sometimes, as in Gage's case,<sup>2</sup> he gives a wrong account of the actual decision. Moreover the authorities which he cites do not always sustain his conclusions.<sup>3</sup> This fault, indeed, runs through all his writings and has carried in its train some unfortunate consequences. For instance, in Pinnell's case, by giving a mere dictum the form and effect of an actual decision upon a point in issue he fixed upon English law the rule that a creditor who, on the day his debt falls due, accepts a smaller sum in satisfaction of the whole, but executes no deed of acquittance, is not bound by his agreement.<sup>4</sup> The result has been, as Sir George Jessel ironically said in *Couldery v. Bartrum*,<sup>5</sup> that according to English law "a creditor might accept anything in satisfaction of a debt except a less amount of money. He might take a horse or a canary or a tomtit if he chose, and that was accord and satisfaction; but by a most extraordinary peculiarity of English law he could not take 19s 6d in the pound." Yet the House of Lords in 1884 held that the error was so firmly established that it did not come within their province to correct it. It may be added in further elucidation of the effect of such errors that the resolution of the judges in Pinnell's case as reported by Coke is not as absurd as some of the distinctions that have been

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<sup>1</sup> See Sugden on Powers 23, n.

<sup>2</sup> 5 Rep. 45 b; see 1 Salk. 53, and Will. 569.

<sup>3</sup> See Jones on Bailments 41, as to Southcote's case, 4 Rep. 83 b, and 1 Inst. 89 a; Stephen's Hist. Crim. Law, ii. 205.

<sup>4</sup> 5 Rep. 117 a; Co. Litt. 212 b; see *Foakes v. Beer*, 9 App. Cas. 605.

<sup>5</sup> 19 Ch. Div. 399.

engrafted upon it from time to time by judges who sought to limit the operation of what they believed to be an erroneous principle. Many questionable doctrines have in this way become firmly imbedded in the law. "I am afraid," said Chief Justice Best, "we should get rid of a good deal of what is considered law in Westminster Hall if what Lord Coke says without authority is not law."<sup>1</sup> Still, it is less true now than formerly that his works have, as Blackstone said, "an intrinsic authority in courts of justice, and do not entirely depend on the strength of their quotations from older authorities."

The basis of the vast reputation that Coke's reports enjoyed for centuries is readily apprehended. The only other reports available in his time were Dyer, Plowden, and parts of the Year Books; in the preface to the third part of his reports Coke gives their number as fifteen. Coke's extensive reports, covering a period of nearly forty years, not only give a fairly complete account of the law during the reigns of Elizabeth and James I., but they made accessible most of the older learning which till then had to be laboriously gathered from the Year Books and the unsatisfactory abridgments. Lord Bacon admitted no more than the bare truth when he said, "To give every man his due, had it not been for Sir Edward Coke's reports (which, though they may have errors and some peremptory and judicial resolutions more than are warranted, yet they contain infinite good decisions and rulings over cases), the law by this time had been almost like a ship without ballast, for that the cases of modern experience are fled from those that are adjudged and ruled in former time." Moreover, his careless and disorderly mixture of things great and small is balanced by the grasp of his intellect and the often inimitable effect of his quaint style.<sup>2</sup>

There are several other brief collections of cases from Tudor times, chief among which is Dyer's (1513-82). Sir James Dyer presided in the Court of Common Pleas for more than twenty years, and his accurate, concise, and business-like notes have always been regarded as among the best of their class. Although these notes were taken by Dyer for his own use and without any thought of publication, they were edited from a genuine manuscript by his nephew, and were subsequently annotated by Chief Justice Treby. Moore's reports (1521-1621), the work of Sir

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<sup>1</sup> See also 17 Pick. 9.

<sup>2</sup> For a detailed examination of Coke's reports see Wallace's scholarly work on *The Reporters* 165 *et seq.*



Francis Moore, the supposed author of the Statute of Uses and inventor of the conveyance known as lease and release, were edited from a genuine manuscript by Sir Geoffrey Palmer, a distinguished lawyer of the Restoration, with the assent of Sir Mathew Hale, who married Moore's granddaughter. Anderson's Common Pleas Reports (1534-1604), the work of a prominent judge, are quite full and circumstantial for their time. Jenkins's so-called "Centuries," a brief but accurate collection of notes of Exchequer decisions, contains some cases as early as the thirteenth century. Leonard's reports (1540-1613), dealing mostly with cases subsequent to the reign of Henry VIII., have been commended by Nottingham and St. Leonards. Benloe and Dalison (1486-1580), Keilway (1496-1531), Brooke (1515-58), and Benloe (1531-1628) are all of secondary value. The only connection between Benloe and Dalison is the fact that they were edited by John Rowe. The later Benloe, which is mainly a compilation, is often called New Benloe, to distinguish it from the former; Brooke is likewise called Little Brooke to distinguish it from the same author's abridgment. Although Keilway's reports are of uncertain value, they record many cases not included in other reports of this period. The volume bearing the name of Noy (1559-1649) is a collection of mere scraps of cases and dicta, with only an occasional statement of the facts involved. Noy was attorney-general under Charles I., and one of the six persons recommended by Bacon in connection with his plan for official reporting as being "learned and diligent and conversant in reports and records." This volume was probably an unauthorized transcript from his note-book. The reports of Brownlow and Gouldsborough (1569-1625) are the work of two prothonotaries of the Common Pleas; they are mostly practice cases. Owen (1556-1615), Goldbolt (1575-1638), Saville (1580-94), and Popham (1592-1627) are of little if any value.

Many of the reports just mentioned extend into the seventeenth century. On the other hand, there are several reports dealing principally with the reign of the first two Stuarts, whose earlier cases date, like Coke's, from Elizabeth's reign. Of these the reports of Sir George Croke, edited by his son-in-law, Sir Harbottle Grimston, master of the rolls, are of most general interest and value. Croke served with credit in a judicial capacity until his eightieth year, when, upon his petition that he might "retire himself and expect God's pleasure," Charles I. granted him a pension. His work is of the first importance whenever he reports a case fully; but the value of his reports as a whole is affected by the fact

that he gives not only cases in which he participated or which he heard, but many others not reported elsewhere, which were merely cited in argument or which were shown to him. However, when he takes a case at second-hand he generally states somewhere that he does so, and the discredit into which some of his work has fallen is due to some extent to his practice of printing a case in instalments and the consequent difficulty of reading him aright. As a rule his reports are too brief to be perfectly clear. These reports are always cited by the names of the sovereigns in whose reigns the cases were determined.

In addition to the standard authorities, Coke and Croke, the first half of the reign of James I. is covered by Yelverton (1603-13), the second half by Rolle (1614-25), and the whole reign by Hobart (1603-25). Yelverton's small volume ranks with the best of the old collections of notes. Yelverton was one of the ablest lawyers of his time, and although his notes are not very technically presented, being prepared for his own use, they are known to be authentic. Rolle's report is a genuine work by Cromwell's able chief justice. Hobart's collection, published several years after the Chief Justice's death by a careless editor, but improved in a subsequent edition by Lord Nottingham, was a standard work of its day. Yet these reports are still very defective in method and precision, and are replete with legal disquisitions which have not served in modern times to add to their usefulness. Hobart includes some cases from the Star Chamber. There are several minor reports of this reign: Davies (1604-12), Lane (1605-12), Ley (1608-29), Calthrop (1609-18), Bulstrode (1609-39), Hutton (1612-39), J. Bridgman (1613-21), Palmer (1619-29), and Winch (1621-25). Davies was a well-known poet and a friend of Selden and Ben Jonson. Ley prints some cases from the Court of Wards. Calthrop deals mainly with cases concerning the customs and liberties of London; Winch principally with declarations.

Beginning in the last years of James I., but dealing mainly with the succeeding reign, is the collection by Sir William Jones (1620-41). These are accurate reports, from a genuine manuscript, of cases decided during this distinguished judge's tenure of office. They are among the most interesting of the old reports. In this reign, also, is the volume bearing the name of Littleton (1626-32); but the cases were probably not reported by him. They are concerned largely with applications for prohibitions. Latch (1625-28), Hetley (1627-32), and March (1639-43) are of small importance. Clayton's assize reports (1631-51) throw some light

on early practice. Aleyn (1646-49) contains loose notes of cases decided during the last years of the reign of Charles I., when judicial proceedings were disturbed by the turbulence of the approaching civil war.

There are few reliable records of litigation during the Commonwealth period. Style's reports (1646-55), which were published by the author himself, are valuable as our sole record of the decisions of Rolle and Glyn, the able chief justices of the Commonwealth. Hardres, Exchequer reports (1655-69) cover part of this period. They were printed from a genuine manuscript, and give fair reports of the arguments, but very brief reports of the judicial opinions, which are usually by Sir Mathew Hale. Siderfin (1657-70), who gives some cases from this time, is of little consequence.

Within the first decade after the Restoration there are several new reports, extending for the most part over the remainder of the Stuart period. Chief among them is Saunders (1666-73), who is universally conceded to be the most accurate and valuable reporter of his age. His work is confined to the decisions of the King's Bench between the eighteenth and twenty-fourth years of the reign of Charles II. Saunders participated as counsel in most of the cases, and he reports them with admirable clearness. In general his reports resemble Plowden's ; but they are much more condensed. He gives the pleadings and entries at length, and follows in regular order with a concise statement of the points at issue, the arguments of counsel, and a clear statement of the grounds of the judgment. The work was subsequently enriched by the learned annotations of Sergeant Williams. Thomas Raymond's notes (1660-84) bear a good reputation. T. Jones (1667-85) and Ventris (1668-91) are of fair authority ; about Levinz (1660-96), and especially Keble (1661-79), opinion is conflicting. It is unfortunate that we have no better record than these volumes afford of Sir Mathew Hale's decisions. The manuscript of Freeman's notes (1670-1704) was stolen by a servant and published without authority.

The so-called Modern reports (1669-1732), which begin in the first decade after the Restoration and cover a period of more than sixty years, are of considerable importance when due allowance is made for certain serious limitations. This work, originally composed of five volumes, was formed by combining in a series the work of different hands. It was subsequently revised and remodeled by Leach, who published a definitive edition in twelve vol-

umes (1793-96). Leach made many improvements in the text; he corrected the headings, inserted the names of the judges at the beginning of each term, and modernized the references. In former editions a variety of cases without any names were often crowded together in such a confused mass as to be practically undistinguishable. Leach separated these cases under the title "Anonymous." Beside contributing many notes and references he added a large number of cases. As thus corrected the work was much improved; but the volumes are still wanting in accuracy and completeness, and, moreover, vary greatly in value. The second, sixth, and twelfth, for instance, have often been cited with commendation, while the reputation of the fourth, eighth, and eleventh is particularly bad. The arrangement of the contents of the work is disorderly and confusing in the extreme. The first two volumes, containing both law and equity cases, deal with the reign of Charles II.; the third mainly with the reign of James II.; the fourth and fifth, during William III.'s reign, and the sixth, during Anne's, are made up of decisions by Chief Justice Holt; volume seven completes Anne's reign and contains decisions of Chief Justices Hardwicke and Lee in the King's Bench from the sixth to the eighteenth years of George II.; volume eight contains King's Bench decisions from the eighth to the twelfth years of George I., during the service of Chief Justice Pratt; the ninth volume is made up entirely of chancery cases, containing Lord Chancellor Macclesfield's decrees from the eighth to the eleventh years of George I., and Hardwicke's from the tenth to the twenty-eighth years of George II.; the tenth, extending from the eighth year of Anne to the eleventh year of George I., is made up of decisions by Macclesfield in law and in chancery; the eleventh gives Holt's decisions during the first eight years of Anne's reign, and Chief Justice Pratt's from the fourth year of George I. to the fourth year of George II.; and the last volume is given to Holt's cases in the reign of William III. This collection of reports, notwithstanding its deficiencies, has perhaps been cited oftener in modern times than any other seventeenth century report. Many of the best known early cases are scattered through these volumes.

The inaccuracies of Shower (1678-94), who gives some good cases, have been somewhat remedied in subsequent editions. Some of Sir Orlando Bridgman's excellent opinions in the Common Pleas are preserved in the reports bearing his name (1660-67). Vaughan's reports (1665-74) from the same court deal principally with the labors of the judge of this name; Lutwyche (1683-1702)

also records some Common Pleas cases from the latter part of the seventeenth century. Among the minor reports of this time, beside J. Kelyng's brief collection of criminal cases (1662-69), are several of little if any value: Carter (1664-85), Comberbach (1685-99), and Carthew (1686-1701). Since almost all the cases printed by Skinner (1681-98) had appeared in prior reports this work is seldom cited.

Some of the ante-Revolutionary reports exhibit technical learning of a high order; but it must be admitted that they are not easy reading. The cumbersome system of feudal tenure, with which the vast proportion of the cases prior to the Restoration are concerned, was at best unpromising material.<sup>1</sup> After the Restora-

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<sup>1</sup> Coke's work affords abundant examples of the verbose and pedantic judicial utterances of early times. On the other hand, Chief Justice Crewe's remarks on the honors of De Vere (W. Jones, 101) is one of the rare specimens of stately eloquence: "I have labored to make a covenant with myself that affection may not press upon judgment; for I suppose that there is no man that hath any apprehension of gentry and nobleness but his affection stands to the continuance of so noble a name and house, and would take hold of a twig or a twine thread to uphold it. And yet Time has his revolutions; there must be an end of all temporal things, — *finis rerum*; an end of names and dignities and whatsoever is terrene; and why not of De Vere? For where is Bohun? Where is Mowbray? Where is Mortimer? Nay, which is more and most of all, where is Plantagenet? They are entombed in the urns and sepulchres of mortality. And yet let the name and dignity of De Vere stand so long as it pleaseth God." The judges were particularly sententious in their use of analogy, as where Hobart contrasts the common and statute law by saying that "the statute is like a tyrant: where he comes he makes all things void; but the common law is like a nursing father, and makes void only that part where the fault is and leaves the rest." Biblical citations and analogies abound. One of the most curious instances of scriptural allusion is Lord Ellesmere's reference to the dissenting opinion of his two dissenting brethren in the case of the Post-nati: "The apostle Thomas doubted of the resurrection of the Lord Jesus Christ when all the rest of the apostles did firmly believe it; but this his doubting confirmed in the whole church the faith of the resurrection. The two learned and worthy judges who have doubted in this case, as they bear his name, so I doubt not but their doubting hath given occasion to cleare the doubt in others, and so to confirme in both the kingdomes, both for the present and the future, the truth of the judgment in this case." There is every evidence that these legal luminaries were devoid of a sense of humor. It has been suggested that Shakespeare derived part of the humorous colloquy between the grave-diggers in Hamlet from Chief Justice Dyer's serious discourse in *Hales v. Petit*, Plowden 262. Sir Thomas Bromley's diverting argument in *Sharington v. Stratton*, Plowden 303, upon the distinction between brotherly love and mere acquaintance as a sufficient consideration to raise a use in land, is a good specimen of the exhaustive ingenuity with which discussions were pursued at the bar. See, also, in the same volume, the report of the agreement between counsel, in the case of *Clere v. Brook*, 442, as to the basis of the preference of males to females in the law of descent. On rare occasions a reporter is moved to display his wit. "One Mr. Guye Faux, of the parish of Leathley, a cavalier, had a cause heard about a plunder upon Monday this week after dinner, and was well

tion the reports increase in interest. The radical reforms in the law of real property, and the slow but steady amelioration during the latter half of the seventeenth century of common law doctrines and procedure, in consequence of the interference of the chancellor, gradually brought within the purview of the common law remedial measures which had theretofore been recognized only in equity. For instance, the introduction in the reign of Charles II. of new trials with reference to the evidence, obviated recourse to equity in cases like that which had brought about the conflict between Coke and Ellesmere.

Although these early reports, with few exceptions, are now seldom cited in practical work, their historical value can hardly be overestimated. Reports that are almost worthless as judicial records often throw valuable side-lights upon early practice and procedure;<sup>1</sup> not infrequently they supply interesting illustrations of the social life of the time.<sup>2</sup>

The Revolution forms almost as distinctive an epoch in legal as

in court, and damages a hundred pounds awarded, and he was found dead next morning, upon the conceit of it, as was supposed." (Clayton's Assize Cases 116.)

<sup>1</sup> One is struck by the interminable arguments. Plowden speaks of cases having "hung in argument eight, ten, and twelve terms." Considering the wide range of the arguments, the consumption of time must have been enormous. For instance, the case of *Stowell v. Zouche*, in Plowden, was argued twice in the Common Bench and then twice in the Exchequer Chamber before all the judges. Calvin's case, in Coke, was argued first at the King's Bench bar by counsel and then in the Exchequer Chamber, first by counsel and then by all the judges; it was afterward twice argued by counsel and then upon four successive days at the next term by all the judges, and thereafter, at another term, by all the judges on four successive days. It was not until Mansfield's time that this habit of reargument was suppressed.

Jury service in early times was plainly no sinecure. "And for that a certain box of preserved barbaries, and sugar called sugar candy, and sweet roots called liquorish" was found on one of the jurors in the consultation room he was fined twenty shillings (Plowden 518). "The judge did put back the jury twice because they offered their verdict contrary to their evidence, as he held, and set a hundred pounds fine upon one of the jury who had departed from his companions; but after, upon examination, it was taken off again, for that it did appear it was only by reason of the crowd and some of his fellows were always with him." (Clayton's Assize Cases 31.) The case of *King v. Buckenham*, Keble, 751, illustrates the severity with which early courts protected their dignity.

It is apparent from an entry in *Birks v. Tippetts*, 1 Saunders, 33 b, that certain professional characteristics do not change materially from century to century: "Twisden, Justice, interrupted Saunders, and said to him, 'What makes you labor so? The court is of your opinion and the matter is clear.'"

<sup>2</sup> For instance, pages 266 to 298 of W. Jones's reports contain "notes taken at a justice seat in the forest at Windsor," forming a quaint record of litigation between Lord Lovelace, Sir Charles Howard, and others, in the time of Charles I., concerning their "deeres and dogges."



in political history. In the passing of the despotism of the Stuarts, and the consequent acknowledgment and definition of civil and political liberty, the judiciary acquired a stability which has never been shaken. The judges have ever since held their office during good behavior instead of at the sovereign's pleasure, and their removal could only be effected by the crown upon the address of both houses of Parliament. The turning point in judicial affairs at the Revolution is clearly marked. Of the notorious instruments of usurpation and violence, the dethroned king's chancellor was in the Tower and his chief justice in Newgate. On the other hand, the new era was opened by the appointment of one of the ablest and best of chief justices, Sir John Holt, to succeed Wright, one of the worst; and from this time no address has ever been voted by either house of Parliament with a view to the displacement of an English judge.

From the Revolution the reports increase in value and importance; they deal more with modern conditions. The development of commerce, and the consequent variety and importance of personal property and of contracts, the growth of maritime jurisprudence, the development of equity, and the general introduction of more liberal and enlightened views of justice and public policy, all combined to give a new tone and impulse to the common law.

It is a great misfortune that the labors of the distinguished jurist whose character and career exemplified the best features of the new era should have been so inadequately preserved. Reference has already been made to the reports of Chief Justice Holt's cases in *Modern*. Holt's term is covered, in addition, by Salkeld (1689-1712), Lord Raymond (1694-1734), and Comyns (1695-1741). The first two volumes of Salkeld (the third volume being a mere collection of detached notes of cases from other reports) were published under the supervision of Lord Hardwicke, and enjoy a good reputation; yet the reports are too brief to be clear, and many of the cases are taken at second hand. Lord Raymond's reports of Holt's decisions are of excellent authority. After Holt's death Raymond seems to have relaxed his efforts. His third volume contains the pleadings at large. Comyn's reports are posthumous, and are not as reputable as his digest. In addition to the volumes above mentioned, some of Holt's cases may be found in Carthew (1686-1700), and Levinz (1660-97), both of poor reputation, and in the appendix to Kelyng's criminal cases. The volume entitled *Temp. Holt* (1688-1710) is mainly an abridgment of Holt's decisions by Giles Jacob, Pope's "blunderbus of the law."

During the first dozen years of George II.'s reign we have several new reports: Barnardiston (1726-35), Fitzgibbon (1727-32), W. Kelynge (1731-36), Barnes (1732-60), Ridgeway (1733-37), Lee (1733-38), Cunningham (1734-36), Andrews (1737-39), and Willes (1737-60), — most of them, unfortunately, of inferior workmanship. Most of the cases in Cunningham, Ridgeway, 7th Modern, and Lee's Cases Temp. Hardwicke, are apparently all taken from the same manuscript; yet they are our main reliance for Hardwicke's services in the King's Bench.

Fortescue (1695-1738) and Strange (1715-48) are of fair repute. Fortescue is partial to his own opinions, which are characterized by more solicitude of taste than power of thought. Strange was master of the rolls and the colleague of Hardwicke, some of whose arguments at the bar and common law decisions he reports. His reports are quite modern in form. Cooke's Common Pleas reports, which are frequently cited, are mostly practice cases. Gilbert's Cases in Common Law and Equity (containing, however, no equity cases) cover the term of Chief Justice Parker. Bunbury (1713-42) and Parker (1743-67) together form a consecutive chronicle of the Exchequer under George I., George II., and the first seven years of George III. Bunbury's reports are mere notes, but they were taken in court by Bunbury himself, and were afterward edited by his son-in-law, Sergeant Wilson.

Willes's reports of his own opinions as chief justice of the Common Pleas are highly authoritative. Although published after Willes's death, they appear to have been carefully prepared by this learned judge, and they were afterward revised and edited by Durnford, the editor of the Term Reports. This volume also contains some cases in the House of Lords. Willes's excellent reports are little if at all superior to those prepared by Wilson (1743-74). This very accurate work records the labors of such distinguished judges as Wilmot, Willes, and De Grey, and is of great value. Sir William Blackstone's miscellaneous collection of cases (1746-79), extending over a period of thirty-three years, do not display the care that we should expect from the celebrated commentator. Wilmot's opinions (1757-70) contain decisions by this learned judge not reported elsewhere. Foster's small collection of criminal cases (1743-61), the work of a very eminent authority in criminal law, is of the highest authority as far as it goes. The collection of notes published in Kenyon's name (1753-60) came from a genuine manuscript, but was probably not designed for publication.



Burrow's reports (1757-71), beginning in the year following Mansfield's appointment as chief justice of the King's Bench and just prior to the accession of George III., mark an epoch in law reporting. Burrow was led to publish his work by the same circumstances that had overcome Plowden's modesty two centuries before. When it became known that he had for many years preserved some account of the decisions of the courts, he was subjected, he says, to "continual interruption and even persecution by incessant application for searches into my notes, for transcripts of them, sometimes for the note-books themselves (not always returned without trouble and solicitation), not to mention," he feelingly adds, "frequent conversations upon very dry and uninteresting subjects, which my consulters were paid for considering, but I had no sort of concern in." Burrow's published reports date only from the time of his appointment as master of the crown office, when personal charge of the court records and regular attendance in court gave him superior opportunities to render his work accurate and complete. Beside their substantial accuracy, these reports are characterized by clearness of statement and lucid arrangement of the materials of a case. Burrow was the first reporter to appreciate the advantage of prefixing to the report of each case a statement of the facts and issues separate from the opinion of the court, and following in regular order with the arguments, the opinions of the judges, and the judgment of the court. As he did not write short-hand, the opinions of the judges are not given in the exact language in which they were delivered; nor were they revised by the judges. The consequent limitations of all such reporting is analyzed by Burrow in terms which should always be borne in mind in citing the early reports.<sup>1</sup>

"I do not take my notes in short-hand. I do not always take down the restrictions with which the speaker may qualify a proposition to guard against its being understood universally, or in too large a sense, and therefore I caution the reader always to imply the exception which ought to be made when I report such propositions as falling from the judges. I watch the sense rather than the words, and therefore may often use some of my own. If I chance not fully to understand the subject, I can then only attend to the words, and must in such cases be liable to mistakes. If I do not happen to know the authorities shortly alluded to, I must be at a loss to comprehend (so as to take down with accuracy and precision) the use made of them. Unavoidable inattention and in-

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<sup>1</sup> It has always been the custom among English judges to deliver their opinions orally. Among the civilians I believe written opinions are the rule.

terruptions must occasion chasms, want of connection, and confusion in many parts ; which must be patched up and connected by memory, guess, or invention, or those passages totally struck out which are so inextricably puzzled, in the original rough note, that no glimpse of their meaning remains to be seen."

"I pledge my character and credit," he says in conclusion, "only that the case and judgment and the outlines of the ground or reason of decision are right." Their accuracy to this extent has never been questioned.

These reports, of the utmost value in themselves as a record of the services of Mansfield, Foster, Wilmot, and Yates, exercised, moreover, a most beneficial influence upon subsequent reporting. Burrow's immediate successors, Cowper (1774-78) and Douglas (1778-84), who give a consecutive chronicle of Mansfield's work from 1774 to the beginning of the Term Reports, follow the same plan and are of similar excellence. Although Burrow had something to say of his vocation, Douglas's reports contain the first deliberate discussion of the reporter's art. "My utmost aim will be attained," he says at the close of his preface, "if I shall be found to have merited in any degree the humble praise of useful accuracy." Such praise he unquestionably deserves. He edited the opinions of the judges as his predecessors had done, but his statement of the facts, pleadings, and arguments is more concise than Burrow's, and his work as a whole is less scholastic and technical.

Substantial accuracy and a uniform arrangement of the materials of a case having been attained, the next step in the progress of reporting was the prompt and regular publications of judicial decisions from term to term. This was accomplished in the King's Bench with the Term Reports, edited by Durnford and East, which were originally published in parts at the end of each term of court. From this time forward the proceedings of the King's Bench have been regularly and systematically reported. Until 1865 reporting was carried on by private enterprise in each court separately. It often happened that there was more than one reporter from the same court ; but some one reporter was understood to be specially authorized by the judges and to have an exclusive, or at least prior, claim to the opinions of the judges as settled and revised by them. Some of the most distinguished of modern English judges, such as Alderson, Cresswell and Blackburn, served an early apprenticeship in reporting, and we have in consequence thoroughly reliable reports of the labors of those great jurists by whom the common law was developed and applied to the needs of modern times.

The Term Reports (1785-1800) cover the term of Chief Justice Kenyon, when Ashhurst, Buller and Lawrence were among the puisnes. The services of Lord Ellenborough and his associates, Lawrence and Bayley, are recorded by East (1801-12) and Maule and Selwyn (1813-17). Barnewall, in association successively with Alderson, Cresswell and Adolphus, reports the decisions of this court from 1817 to 1834, when Lord Tenterden presided over such puisnes as Bayley, Holroyd and Littledale.

The legal reforms contemporaneous with the Reform Bill of 1832 were instrumental in effecting some important changes in the relative value of the different reports. By the Uniformity of Procedure Act the concurrent jurisdiction of the three superior courts of common law was officially established. At the same time, the Exchequer Chamber was reorganized as a regular court of appeal from the three common law courts. The decisions of this appellate tribunal, which was composed on appeals from one court of the judges of the other two, were thereafter included in the reports of the court from which the appeal was taken; and this interchange of judges tended to equalize the standing of the three courts. Aside from this fact, moreover, there was a noticeable revival in the Common Pleas and Exchequer in this period.

Brief reference has already been made to some of the eighteen volumes of decisions of the Court of Common Pleas prior to 1785, chief among which were the individual collections of Chief Justices Orlando Bridgman, Vaughan and John Willes. This court, although a closed court (*i. e.* only sergeants could argue cases there) until far into the nineteenth century, became very efficient in the last decade of the eighteenth century through the services of several able lawyers who sat on this bench for short periods on their way to scenes of more distinguished labor. The excellent reports of Henry Blackstone (1788-96), recording the services of Loughborough, Eyre, Lawrence, Buller and others, are equal to the best of the King's Bench reports. From this time the proceedings of the Common Pleas have been regularly reported. But after the retirement of the judges just named the court declined in authority. This falling off is observable during the period covered by Bosanquet and Puller (1796-1807). Taunton's reports (1808-19) as a whole have never been very highly esteemed. The Common Pleas probably reached its lowest standing in the first five volumes of Bingham's reports. But the reputation of the court rose rapidly under Chief Justice Tindal (1829-46). The services of this eminent

judge, together with his associates, Bosanquet, Maule, and Cresswell, have given deserved repute to the later volumes of Bingham and the reports of Manning and Granger (1840-44). The two series of Common Bench reports (1845-65) represent the highest standard attained by this court. These thirty-nine volumes (particularly the last twenty-five) may be numbered among the classical repositories of the common law, recording as they do the distinguished labors of Jervis, Maule, Cresswell, Vaughan Williams, Willes, Cockburn, Erle and Byles, and the decisions of the Exchequer Chamber on appeal.

Five small volumes comprise our record of the Court of Exchequer prior to 1792. During all this time the Exchequer was hardly regarded as a superior court. Sir Mathew Hale lent distinction to the court after the Restoration, but it was not until far into the nineteenth century that it ranked on an equality with the other two common law courts. The twenty volumes of reports of its proceedings between 1785 and 1830, mostly by Messrs. Anstruther and Price, are seldom cited. Lord Lyndhurst's acceptance of the chief baronetcy in 1831, after having held the chancellorship, attracted some attention to the court, but it was not until Sir James Parke took his seat upon this bench that its reputation was assured. During the period of Baron Parke's service (1834-56) the Exchequer exercised an almost dominant authority. The twenty-seven volumes of reports by Messrs. Crompton, Meeson, and Welsby (Crompton and others, 1830-36; Meeson and Welsby 1836-47; Exchequer Reports, 1847-56), containing the decisions of Parke, Alderson, Pollock, Rolfe and Martin, together with the decisions of the Exchequer Chamber on appeal, have always been highly esteemed for their vast, though for the most part very technical, learning. During the next decade the court, as reported by Hurlstone, was not so effective, in consequence of the habitual conflict of opinion among the barons. Of a bench including Pollock, Martin, Bramwell and Channel, Bramwell was easily the most distinguished.

Notwithstanding the rapid rise in authority of the Common Pleas and Exchequer toward the middle of the last century, the King's Bench, if it failed to maintain its former preëminence, sustained at all events a corresponding standard of excellence. As a record of the labors of Denman, Littledale, Patteson, and the early services of Coleridge, Wightman, Erle and Campbell, the two series of reports by Adolphus and Ellis (1834-52) have always been held in high esteem. The court attained its highest stand-

ing, however, during the period from 1852 to 1865 under Campbell, Coleridge, Wightman, Erle, Cockburn and Blackburn. This period is reported by Messrs. Ellis, Blackburn, Best and Smith.

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*(To be continued.)*

## THE NEGOTIABLE INSTRUMENTS LAW—A REJOINDER TO DEAN AMES.

THE best test of a good shield," says the proverb, "is a sharp lance." No keener weapon than that wielded by the accomplished Dean of the Harvard Law School could be turned against the Negotiable Instruments Law. The fact that in his two elaborate attacks on that code he has failed to disclose a single serious flaw is the most conclusive proof of its invulnerability. A word of recapitulation and introduction may be allowed before making a direct reply to his "One Word More" in the February number of the *HARVARD LAW REVIEW*.

Of the twenty-three sub-sections of the law to which the critic objects, eleven are taken from the English Bills of Exchange Act,<sup>1</sup> one follows the German code,<sup>2</sup> one is taken from a New York statute,<sup>3</sup> three are mere matters of form,<sup>4</sup> and the objections to the remaining seven chiefly come, it would seem, from misinterpretations of the meaning of the law on the part of the critic.

The eleven sub-sections taken, most of them word for word, from the English Bills of Exchange Act, and all so identical therewith that the critic's objections apply to the acts equally, need no justification at this late date. They have been the satisfactory law of England and her colonies for twenty years. On them criticism is barred by the natural statute of limitations and the universal approval of the commercial world. One might as well criticise the Bill of Rights or the Lord Chancellor's wig. No text-book that I know of holds any doctrine contrary to the law of these eleven sections. Nor in fact has the Dean suggested any text-book which is in favor of any one of his twenty-three strictures. As to the practical working for twenty years of these eleven sub-sections, I beg to refer to the testimony of one of the committee who helped to draft the English Act.

In December last I wrote Mr. Arthur Cohen, Q. C., who was one of the committee who framed the English Act, stating the

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<sup>1</sup> 3-2 from 3-3 of English Act; 9-3 from 7-3, with an addition not in question; 9-5 from 8-3; 22 from 22-2; 29 from 28; 37-2 from 35-2; 49 from 31 4; 70 from 52; 175 from 65-5; 186 from 74, and 66 from 52-2.

<sup>2</sup> Sec. 20, art. 95, German Exchange Law.

<sup>3</sup> Sec. 137.

<sup>4</sup> 36-2, 36-3, 37.

sections of the English Act which Dean Ames had criticised in his first article, and asked him if those sections had caused any difficulty in English practice. Unfortunately the copy of the American Act which I sent to him did not reach him, and he could only answer partially the points suggested. I wrote again, sending the two articles of the Dean, the answer, and the American Act, expecting to be able to publish his reply in this article. As it has failed to reach me at this writing,<sup>1</sup> I can only give the substance of the letter received from him dated January 30, 1901. It was evidently not intended for publication as a whole, but I am permitted to make the following quotations :—

“No difficulties have arisen in England with reference to the suggested points, nor any litigation except as to the meaning of ‘fictitious person.’ The question came before the House of Lords in *Vagliano v. Bank of England*, 1891, Appeal Cases, 107.

“I think you are to be congratulated if your Act has not been and cannot be objected to for more formidable reasons.”

In a letter received several years ago Mr. Cohen had written as follows :—

“In my opinion the language of your bill is singularly felicitous. It is more clear, concise, less stiff and artificial than our Bills of Exchange Act, and in this respect—one by no means unimportant—your draft is an improvement on our Act.”

Perhaps it ought to be added here that Judge Chalmers, the draftsman of the English Act, to whom a draft of the Negotiable Instruments Act was sent in 1896, after congratulating Mr. Crawford on the success of his work, recommended Mr. Cohen as one of the three best authorities in England on the law of bills and notes, the other two, I believe, being eminent London bankers, who had participated in the drafting of the English Act.

One word as to those eight sections which the Dean does not think it necessary to re-argue. As my answer to the criticisms on those eight sections, founded chiefly on their utility and convenience, does not seem convincing to the critic, I pause, deprecatingly, to suggest that the same eight sections are also well sustained by authority, as well as by reasons of convenience.

Let us see. Section 20, it is claimed, makes by implication an unauthorized agent liable personally on the note. In addition to the answer already given in the *Yale Law Journal* for January, 1901, *i. e.* “that the agent alone is in law, as in fact, the real

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<sup>1</sup> For letter received after sending to press, see Appendix, p. 36.



maker of the note" in such cases, and might well be made directly liable, as he always is ultimately, it is proper to refer to the fact that the rule which the Dean claims is laid down in the Negotiable Instruments Law is adopted in the German Code, to which the Dean refers us as a model,<sup>1</sup> and is declared in *Byars v. Doores*,<sup>2</sup> as having "the weight of authority" decidedly in its favor at that time. Tiedeman (sec. 84) cites eleven cases so holding, to which we may add 147 Ill. 520; 104 Ind. 32. There are more cases one way and more states the other.

The Dean's criticism on sections 23-2-3 was that the word "trustee" was more descriptive of the position of the indorsee in restrictive indorsement than the word "agent," and so but one word should be used. It is proper to say that the text-writers take exactly the opposite view,<sup>3</sup> and so did Dean Ames when he published his *Leading Cases*. In his *Index and Summary*, p. 837, is the following section:—

"The term 'restrictive indorsement' is commonly but loosely applied to *two distinct kinds of orders*,<sup>4</sup> namely, to an order, whereby the holder indorses a bill to one person in trust for another, *e. g.* 'Pay A for account of B;' 'Pay A for the use of B;' and to an order whereby the holder simply deposes to an agent the business of collecting a bill, *e. g.* 'Pay to A for my use.'" It was with reference to this "common," *i. e.* ordinary use of the word that the section in question was framed.

Mr. Tiffany, in the new Norton Hornbook on Bills and Notes, as usual hits the exact distinction tersely and clearly (p. 124):—

"The first and commonest variety, and the one which is generally spoken of by the text-writers as the restrictive indorsement, is that where the holder deposes to some other person the business of collecting the bill; the other where the holder indorses the instrument to one person for the use or benefit of, or as the trustee of another."

Regarding section 49, which treats of the right to have the transferrer indorse, which follows the English Act and does not follow the Colorado Act, as the critic would have it do, it may be pertinent to say that the annotator of the Colorado Act, Mr. J. Warner Mills, (p. 23), says, speaking of the two forms of expression, "but either form of expression establishes the equitable rule of law."<sup>5</sup>

<sup>1</sup> American Law Register, March, 1900, vol. 39, p. 145.

<sup>2</sup> 20 Mo. 284.

<sup>3</sup> See especially Chalmers, 5th ed.; McLaren on Canadian Bills of Exchange Act, 214; Tiffany's Norton, 124.

<sup>4</sup> The italics are ours.

<sup>5</sup> See, also, Huffcutt, 26, to the same effect.



Section 66 is substantially in the line of section 55 of the English Act, as already suggested.

Section 68, making joint indorsers liable severally, which the critic called "a blunder," and now calls "unprecedented" and "arbitrary," is in accord with the theory of the law already established in most of the states which adopt the reformed procedure, say three quarters of the states of the Union.<sup>1</sup> "The liability of each indorser is several. So now by statute generally."<sup>2</sup>

Section 137, making destruction of a bill acceptance, at first was objected to as "a perversion of language," "fantastic and inexplicable."<sup>3</sup> It is now described as "crystallizing an unscientific conception." Whether it is fantastic, or crystalline, or scientific, is not, perhaps, so very material. But instead of its being "a conception" of the draftsman or of the conference, the section was taken from the statutes of eight states, including the state of New York, from all of which the report was that "it had worked well." The bankers regarded it as a simple, practical, definite working rule, and none of the twelve commentators on the Negotiable Instruments Act have suggested the least objection to it.

Section 175. Payment for Honor. The Dean argued in the December number of the REVIEW that because Mr. Chalmers adopted in the English Bills of Exchange Act the doctrine of an overruled case,<sup>4</sup> the fact of its having been overruled must have been overlooked. By reference to note 3, page 237, of the fifth edition of Chalmers, he will see that the overruling case<sup>5</sup> is duly cited as well as the continental codes. There was no "slip of memory" there. Daniel favors the overruled case.<sup>6</sup>

DIRECT ANSWER TO "ONE WORD MORE" IN THE FEBRUARY  
NUMBER.

Section 3-2. This section asserts the familiar doctrine that an order or promise is not rendered conditional by "a statement of the transaction which gives rise to the instrument."<sup>7</sup> The Dean's first article declared this clause "unmeaning, deplorable, nullifying

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<sup>1</sup> Connecticut Rules of Practice, p. 1, sec. 2; 2 Bliss, 53; Pomeroy, 2d ed., 326.

<sup>2</sup> Norton, 159.

<sup>3</sup> See our answer to these adjectives and others, 10 Yale Law Journal, 88, January, 1901.

<sup>4</sup> *Ex parte* Lambert, decided by Lord Erskine.

<sup>5</sup> *Ex parte* Swan.

<sup>6</sup> Daniel, sec. 1255; Norton, 301.

<sup>7</sup> English Act, 3-3; 4th Am. & Eng. Enc. of Law, 89, citing 43 cases.

several decisions," and either "mischievous" or "obscure, inartistic, and useless." He cited, to show the inefficiency of the Negotiable Instruments Act on this point, the case of *Third Bank v. Spring*,<sup>1</sup> an Erie County Supreme Court case, in which he said "the judge ruled that the Negotiable Instruments Law had no application to such a note." In the answer it was stated that that case was reversed in the Appellate Division.<sup>2</sup> The Dean now replies that the reversal did not affect the point he made that the Negotiable Instruments Act was not applicable. On reëxamination it turns out that the note in question in that case was made in 1896 and negotiated in May, 1897. Whereas the New York Negotiable Instruments Law did not go into effect until October, 1897, and therefore, as the judge said, had no application to it. The law had not then become operative in the state of New York. So much for the wee Supreme Court case of Erie County, which was supposed to demonstrate the inefficiency of the Negotiable Instruments Law as expressed in section 3-2. As this is the only case decided on the Negotiable Instruments Law cited by the Dean, and that did not come under the law at all, the natural inference is that the Dean labors under some difficulty in treating the subject under the "case law system." He is likely to continue to so labor, for the Negotiable Instruments Law, not only in England, but in this country, diminishes litigation and the necessity for it to an astonishing degree.

Next page, in note 3, the Dean speaks of "Judge Brewster's startling suggestion that a note payable to the order of unincorporated associations or the estates of deceased persons is payable to bearer by force of this section 9-3." But in point of fact, by referring to the answer published in the *Yale Law Journal*, on the criticism on section 9-3, it will be seen that, instead of being put down as a statement of the writer in the *Law Journal*, it is put down as follows:—

"His [the Dean's] criticism seems to imply that the act should cover rare and imaginary exceptions rather than serve the commendable purpose which he concedes that the section has, of providing for common cases, such as notes payable to unincorporated associations, estates of deceased persons, and the like."

If the concession is denied, that is a question of fact. If it is admitted, is it quite right to exploit one's own admission as the opinion of his opponent? As to the section criticised, it is not

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<sup>1</sup> 28 N. Y. Misc. 9.

<sup>2</sup> 50 App. Div. 66.

only more conservative than the English act, but it is so laid down in the text-books.<sup>1</sup> As to the doctrine of the illustration itself, to wit, that the estate of one deceased is regarded as a fictitious payee, the only point about that was that it was convenient in such cases to use a fictitious name.

“How far afield a figure sometimes leads.”

Is section 40 inconsistent with sub-section 9-5?

Sub-section 9-5 reads as follows:—

“The instrument is payable to bearer when the only or last indorsement is an indorsement in blank.”

Section 34 is:—

“A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery.”

Section 40 is:—

“Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.”

How, giving the language of section 34 its legitimate effect, there is any repugnancy between sub-section 9-5 and section 40, I have never been able to perceive. Without rediscussing whether the critic was justified in changing the language of section 40, in the first article, or whether the substantive “negotiation” in section 34 applies to the verb “negotiated” in section 40, I much prefer to refer the reader to the full and clear exposition of the whole matter in the new Norton Hornbook, pages 110 to 118. Mr. Tiffany’s paraphrase of section 40 on page 116 assumes that the words “indorsed in blank” are equivalent to the words “payable to bearer,” and is as follows:—

“An instrument which is originally payable to bearer, or which has been indorsed in blank, though afterwards specially indorsed, is still payable to bearer; except as to the special indorser, who on such an instrument, after such an indorsement, is only liable on his indorsement to such parties as make title through it.”

But what is the result of this interpretation? In the new Norton Hornbook, not only do 9-5 and 40 stand as good law, but after

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<sup>1</sup> Daniel, 119; Randolph, 169; Tiedeman, sec. 243.

going over all the cases on pages 116-17-18, and after stating that the application of the rules "is somewhat confusing to the student," Mr. Tiffany sums up as follows:—

"The rule is well settled that if a note or bill be once indorsed in blank and afterwards indorsed in full, it will still, as against the drawer, payee, and prior indorsers, be payable to bearer, though, as against the special indorser himself, title must be made through his indorsee."

In other words, Mr. Tiffany finds no inconsistency at all. Subsection 9-5 and section 40 stand in perfect harmony. In fact, one is the complement of the other.

As to section 22, the Dean's claim is that some members of the committee informed him that they interpreted the section differently from the interpretation given in the Yale Law Journal. I can only say that I never heard of any other interpretation, nor was any such intimated when the committee reported to the conference that they found none of the Dean's criticisms tenable.<sup>1</sup>

Section 29. Accommodation Paper. One hardly knows what language to use in characterizing the serene self-confidence with which the Dean reiterates his conviction that everybody is wrong in defining accommodation paper as paper without consideration. Having shown in the answer that not only all the cases, all the text-writers, and all the encyclopedias, the law dictionaries, and the ordinary English lexicons, are against him, and all give the same definition as the Negotiable Instruments Act, his only reply is that "the conference erred in good company." It is the Dean against the world. Therefore so much the worse for the world. This eccentric heresy of the Professor makes his illustrations referring to accommodation parties utterly meaningless. The contestants are not using the same yardstick.

The original criticism on section 34 was "that it nowhere stated that an indorsement is an order, and nowhere defined the difference between a guaranty and an indorsement." Our answer was that it was for the court rather than for a code on negotiability to settle questions outside of negotiable instruments. The new criticism is that "it is unfortunate that an excellent opportunity to unify the law was neglected." Yet in his first note the Professor prides himself on the fact that the adoption of his proposed amendments would shorten the act by something more than a dozen lines. One ventures to say that if this "excellent opportunity to unify

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<sup>1</sup> For the fair interpretation of section 22 see the new edition of Norton's Hornbook, 220, and note 15 therewith.

the law " by laying down the law of assignments and guaranty were embraced, and the omissions which the Dean recommends at the end of his first article were also added, the Negotiable Instruments Law would have contained fifty instead of thirty-six pages.

Section 37 is an exact copy of the English Act. The fact that no trouble has arisen under it in England sufficiently indicates that the immunity the Dean claims for the solvent indorser "A" does not exist. Equity would take care of that.

Section 64. Anomalous Indorsers. One must answer the algebraic illustration of the supposed misapprehension of the present writer on the Dean's first criticism by giving a Roland for an Oliver. For the lamentable fact is that the Dean seems to have misapprehended the answer already given and the reasons stated why his first proposed substitute would defeat the purpose of the act. In the careful examination of this section by Mr. Tiffany,<sup>1</sup> the editor says, after referring to the previous "chaos of conflicting authorities," and speaking of the rule laid down in the Negotiable Instruments Law, as "an important step toward uniformity on this subject," "that it has the further advantage that it abolishes so-called 'presumptions,' lays down definite rules of liability; and that it probably gives expression as nearly as possible to the actual intentions of the parties in such cases." As the Dean's definition of accommodation paper includes paper for value received, his new illustration has no meaning, if the illustration makes "B" an accommodation indorser.

65-4. The Dean claims the doctrine quoted in the answer from his Leading Cases, that an indorsee without recourse is liable to subsequent holders on his warranty of genuineness, was "a youthful indiscretion" committed in his "callow days," and adds that neither now nor then did he ever entertain the heresy that there was any difference between the obligation of a qualified indorser and that of a transferrer by delivery. In addition to former quotations from Daniel and Norton on this subject we beg to refer him to the following quotation from the very able article on Bills and Notes in the 4th American and English Encyclopedia of Law, 2d edition, page 281:—

"Indorsement considered as a transfer of title. (1.) Generally. The liabilities of an indorser as a vendor or transferrer of the instrument are identical with those of a transferrer by delivery, with this exception, that while a transferrer by delivery is liable only to his immediate transferee,

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<sup>1</sup> Norton's Hornbook, pages 138-143.

an indorser, being a party to the instrument, is liable to all subsequent bona-fide holders." <sup>1</sup>

As both this article and the code were published simultaneously, neither could have borrowed from the other. The critic has no need to blush for a "youthful indiscretion" adopted by four of the best American authorities.<sup>2</sup>

Sections 70 and 119-4 add nothing to what have already been discussed. Reiteration does not advance the argument.

Section 120-3 declares that a person secondarily liable on the instrument is discharged by the discharge of a prior party. The critic's arbitrary reply to the answer in regard to this section almost eclipses his remarks on section 29. It had been said in answer to the Dean's strictures on section 120-3 that the context clearly showed that his rendering was a misinterpretation of the meaning of that section, that none of the learned authors who have discussed the Negotiable Instruments Act since it was enacted interpreted it as he did, that the commissioners from thirty-two states whose special duty it was, in reporting the Negotiable Instruments Law for adoption, to mention every change, never suggested any change from the existing law in that section, that it was the language generally given in the text-books,<sup>3</sup> and that the ordinary rule of construction of codes reaffirming the common law was never to assume any change unless imperatively demanded by the language used. The only reply to all these points made in the answer is that the Dean entertains a different opinion. Why he should do so he does not inform us, except by reference to the Vagliano case.

To be sure the Vagliano case refused to add the words "to the

<sup>1</sup> To the same effect is Tiedeman, section 244, note 5; Norton, 167.

<sup>2</sup> It may be pardonable to repeat here a note on this section from our answer in the Yale Law Journal, January number, page 93, although that note is perhaps more pertinent to some other sections in which the Norton Hornbook is freely quoted:—

"On this point I have cited chiefly the new Norton Hornbook, on Bills and Notes, just edited by Mr. Francis B. Tiffany, not only because it is one of the ablest and most interesting discussions on this special point, but because the editor seems to have taken most of the new matter in the book equally from the Negotiable Instruments Law and Professor Ames's Leading Cases on Bills and Notes. The preface says: 'The present editor wishes to express his great obligation to Professor Ames, whose Index and Summary at the end of the cases, unquestionably the most important contribution to the subject that has been made in America, he has constantly consulted.' It is, hence, doubly reassuring to note that with so orthodox an authority for 'constant' reference, as the Leading Cases on Bills and Notes, Mr. Tiffany quotes a score of definitions, bodily, from the Negotiable Instruments Law, and so far as I have observed does not seem to disagree with its statement of law on any point."

<sup>3</sup> Norton, 260 and 308.



knowledge of the acceptor" to the section of the English Act relating to fictitious payees; but why? Because, as the court says in the case of *Shipman et al. v. Bank of the State of New York*,<sup>1</sup> it is apparent the code "intended to make the change and did make the change," but with such extreme reluctance and dissent as to strengthen rather than weaken the doctrine we had cited in *Sutherland and Endlich*, that in codes restating the common law, "no change is presumed except by the clearest and most imperative implication." In point of fact the Dean practically seeks to read into this sub-section (120-3) the words "by operation of law."

The Dean further claims this paragraph, when interpreted as everybody else interprets it, as meaning "a discharge by the holder," could apply to "no possible case." Then what "possible" harm could it do, except in releasing that extraordinary accommodation indorser, always in reserve, who haply indorsed it "for value received?"

Section 186. But the most truly academical criticism in the whole list is the objection to section 186. The section reads thus:—

"A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Copied from the English Act, repeated in the text-books since the first edition of *Byles on Bills*, with no reported case to the contrary, this section, at least, would seem to be solid. But, no! In section 89, treating of notice of dishonor generally, the Dean detects a hidden danger, and insists that under the combined operation of the two sections, the drawer of a check would escape liability if no notice of dishonor were given. To be sure, section 89 also is in the English Act and in all the text-books, but what of that? Section 186, the critic says, taken with section 89, establishes a rule "opposed alike to justice and to well established law." How or why the joint effect of the same two statements of law should be one thing at the common law or the law merchant and totally and mischievously different when put in a code, does not appear. If what the Dean means is that section 186 is orthodox enough, but that section 89 is not sufficiently guarded by its own expression and by sections 70, 114, 185, and other kindred sections (as I believe it is), that raises another very different question not heretofore discussed. Although both the English and American

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<sup>1</sup> 126 N. Y. 318, 335.

acts define checks to be bills of exchange for the sake of convenience, in point of fact this is not strictly true.<sup>1</sup> And the courts doubtless, in construing the Negotiable Instruments Act, would recognize the distinction between the two, and construe section 89 accordingly, with reference to the ordinary law on demand paper and checks, and practically hold the drawer primarily liable, as he is, in fact, the principal debtor. But however that may be, instead of section 186 aiding the supposed unjust effect of section 89, in discharging the drawer of a check if notice of non-payment is not given, its effect is exactly contrary to that.

For, since the only penalty for delay in presentment (186) is the loss occasioned by delay, and *not* a discharge, the natural inference therefrom would be that the same exceptional exemption as to checks would continue in case of non-payment, namely, that the only penalty would be the loss occasioned by the delay, and *not* any absolute discharge, as claimed by the Dean. It is sufficient here to add, in regard to both sections 186 and 89, that they have been fairly tried and worked well together.

Considering the enormous business in checks every day, the fact that in twenty years' experience in England and four years in four states in the Union, no impecunious drawer of checks has ever been crafty enough to claim a discharge of his obligation in this ingenious way would seem of itself to refute the strained construction of the Dean. But if a right of action was lost on the check by the effect of the combined sections, the drawer would be liable on the original debt.<sup>2</sup>

*Lyman Denison Brewster.*

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## APPENDIX.

### LETTER OF MR. ARTHUR COHEN, Q. C., ON THE NEGOTIABLE INSTRUMENTS LAW.<sup>3</sup>

5 PAPER BUILDINGS, TEMPLE, LONDON,  
March 11, 1901.

DEAR SIR, — The following are some observations which occur to me in reference to some of Professor Ames's very ingenious and able criticisms of the Negotiable Instruments Act in the *HARVARD LAW REVIEW*.

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<sup>1</sup> See 5th Am. & Eng. Enc. of Law, page 1030 and note 2; Norton, page 408, sec. 151.

<sup>2</sup> 2 Randolph, 1554; 2 Daniel, sec. 1120; Van Schaack on Checks, 164, who says "the holder is agent of the drawer," and on page 25 "the drawer is the principal debtor;" Tiffany's Norton, 418, which cites on this point, among many other cases. *Bull v. Bank*, 123 U. S. 105.

<sup>3</sup> This letter was received after the above article went to press.



First, Section 3 provides that an order or a promise is not rendered conditional by the addition of a statement of the transaction which gives rise to the instrument. These words were inserted in the English Act in order to provide for cases where the bill or note contains an order or a promise to pay a certain sum "being a portion of a value or order (*sic*) deposited in security for the payment hereof," or "on account of money advanced for a certain person," and similar cases in which the transaction on account of which the bill or note is given is referred to. Such cases presented themselves in 7 T. R. 733, L. R. 3 Q. B. 753, and other reported decisions. The words in the English Act correctly state what the English law is, and I see nothing obscure, inartistic, or useless in them, nor do I think that any intelligent judge could be misled by them.

As regards section 36-2-3, I do not think that the words used could possibly mislead or present the slightest difficulty to any intelligent person, and as it is by no means easy to determine in what cases an agent is or is not a trustee in the proper sense of the word, I am of opinion that the section ought not to be altered.

Section 9-3 declares "an instrument to be payable to bearer when it is payable to the order of a fictitious or non-existing person, \*and such fact was known to the person making it so payable."\* The section is substantially the same as the corresponding one in the English Act with the exception of the words between asterisks. In *Vagliano v. Bank of England*, 23 Q. B. D. 260, Lord Justice Bowen says:—

"The exception that bills drawn to the order of a fictitious or non-existing person might be treated as payable to bearer was based upon the law of *cstoppel*, and applied only against the parties who at the time they became liable on the bill were cognizant of the fictitious character or non-existence of the supposed payee."

The English Act has modified and simplified the law, but the Negotiable Instruments Act has not gone so far as the English Act. I do not think that the section in question will work any injustice, or that there is any sufficient ground for altering it.

Section 9-5. This section is substantially the same as 3 of the English Act. We altered the English law as it stood before the passage of the act. This was deliberately done on the strong recommendation of the bankers and merchants who were members of the committee, and I have reason to believe that the alteration of the law has been generally approved of in the United Kingdom, and there does not seem to have been any opposition to it manifested in the United States.

Section 20. This section certainly alters the law as it exists in England, but I think it very likely that the alteration is an improvement. The wisdom of the rule laid down in *Cohen v. Wright* has often been doubted. Professor Ames takes one case, that of the supposed principal being a bankrupt. Even in that case it would be doubtful what could be re-

covered until the dividend was declared and the bankruptcy concluded; and in the case of the principal not being bankrupt, but being a man in bad credit, the question would have to be left to a jury what amount could properly be recovered from the principal. It may well be held that in actions on negotiable instruments, against a person who professedly acts on behalf of another person, A, it would be inconvenient to allow the former to allege an attempt to prove that probably the whole amount could not be recovered from A. I think the 20th section should be retained, and may be considered as a practical improvement of the law, unless there be reason to suppose that merchants and bankers think it unjust. I agree with Mr. Brewster that much indulgence should not be shown in business to a person who professes to have authority when he is really acting without authority.

As regards section 22, it expresses what Mr. Justice Mellor stated as reported in the 8th of Best & Smith, page 833. I think the section objected to is equivalent to the corresponding section of the English Act. The infant cannot be sued, but he can transfer the instrument so as to enable a holder to sue other persons. Professor Ames seems to think it unjust that persons should be able to *retain the negotiable instrument* against the infant. I do not see the injustice of this if the infant himself cannot be sued on the instrument. Again, I do not think any intelligent judge could be misled by the wording of this section.

Section 29. This is the same as the 28th section of the English Act, which has given rise to no doubt or difficulty. "Without receiving any value therefor" means without receiving any value for the bill, and not *without receiving any consideration for lending his name*.

Section 68. This section does alter the law, at any rate as it exists in this country. To me it seems very doubtful whether it is not an improvement by reason of its sweeping away certain technicalities. There has always been a tendency in the law merchant to consider contracts which are in form joint contracts as being intended to be joint and several.

Section 137. I am of opinion with Professor Ames that this section is imperfect. It would seem to imply that if the bill be destroyed or not returned accepted within a reasonable time, notice of dishonor need not be given to the drawer. This is not in my opinion the law, and ought not to be law.

I do not think the act is imperfect because it does not contain rules relating to the conflict of laws, any more than it could be considered imperfect because it does not contain rules defining illegality or fraud. The sections in the English Act relating to the conflict of laws were introduced in order to embody the result of certain recent English decisions. I do not know whether the American decisions relating to these questions are sufficiently uniform to render it desirable to embody these results in a code relating to negotiable instruments.

On the whole, I consider the Negotiable Instruments Act a very important and ably framed code. Its style and language seem to me in some respects better than those of the English Act, as being simpler, less technical, and more easily intelligible. I have no doubt it is not perfect. What code is perfect? Whether the very few blemishes which may have been discovered are such as ought to induce states which have not yet adopted the act to require it to be amended, in a few respects, is a question of expediency and public or state policy on which I do not venture to express an opinion.

I am very sorry I have not had time to write more or to put my observations into a better shape.

We are, you may be interested to know, engaged in codifying the law of insurance, and I think the bill will be found to be a useful measure.

Believe me, yours very sincerely,

ARTHUR COHEN.

## HISTORICAL AND PRACTICAL CONSIDERATIONS REGARDING EXPERT TESTIMONY.<sup>1</sup>

NO one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best. In early times, and before trial by jury was much developed, there seem to have been two modes of using what expert knowledge there was: first, to select as jurymen such persons as were by experience especially fitted to know the class of facts which were before them, and second, to call to the aid of the court skilled persons whose opinion it might adopt or not as it pleased. Both these methods exist at least theoretically at the present day, though each has practically given place to the third and much more recent method of calling before the jury skilled persons as witnesses. No doubt, there are good historical reasons why this third method has survived, but they by no means justify its continued existence, and it is, as I conceive, in fact an anomaly fertile of much practical inconvenience.

The first method mentioned above was to impanel a special jury, which in this connection means a jury of persons especially fitted to judge of the peculiar facts upon which the particular issue at bar turns. The practice is certainly old, at least in one instance of like kind, the jury of matrons *de ventre inspiciendo*. Bracton<sup>2</sup> gives the form of the writ<sup>3</sup> in which it is essentially the same as the actual practice even in this century, in 1838.<sup>4</sup> Moreover, we find in the writ the reason for this peculiar procedure. The *legales*

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<sup>1</sup> So far as concerns the attempt to trace the outline of the origin of expert evidence, I must acknowledge my great indebtedness for materials to Professor James B. Thayer, who has so much made the whole subject of evidence his own that no one can come into it without feeling, to a certain degree, a trespasser. It is but fair to say, however, that Professor Thayer is in no sense the sponsor of any of the conclusions in this article, historical or otherwise, and that I do not even know that any one of them would meet with his approval, however grateful to me might be such a result.

In regard to the material in Howell's State Trials, I cannot hope that I have found all of it. I have been over all the trials up to 1780 with more or less thoroughness, but cannot, of course, suppose that much has not escaped my notice.

<sup>2</sup> De Leg. lib. ii. fol. 69.

<sup>3</sup> See, also, for a kindred Roman practice, Dig. lib. xxv. tit. 4.

<sup>4</sup> Reg. v. Wycherly, 8 C. & P. 262.

*et discretas mulieres per quas veritas melius sciri poterit* shall see the woman whose condition is to be examined and are to satisfy themselves by certain specified methods, *quibus inde melius possit certiorari utrum prægnans sit necne*. True it is we do not learn from Bracton to what extent what the jury said was binding. They did not speak of the whole issue between the parties, and the procedure was incidental merely to the issuance of a writ to the lord to let into possession one tenant or another, but I cannot think that this is a distinction of any significance ; the fact remains that a jury of persons supposed to be especially skilled was summoned, and their conclusion was in fact followed by the court, or at least formed an element as fact in its decision. This practice we know has continued even to this century.<sup>1</sup>

But the writ *de ventre inspiciendo* was by no means the only case of a jury of persons peculiarly qualified upon the issue. The custom was not only known but exceedingly common in the city of London throughout the fourteenth century in trade disputes.<sup>2</sup>

Many of the cases are informations by the supervisors of the different guilds who, in accordance with their oaths, brought before the mayor offenders against the trade regulations. The mayor then summoned a jury of men of that trade, and their verdict decided whether the defendant had offended the trade regulations, and upon it the mayor gave sentence.<sup>3</sup>

But this was not the only case. Often it happened that either the public prosecutor or some private person, either individually or through the public prosecutor, would present to the mayor his grievance in that he personally had suffered false usage at the hands of tradesmen, *e. g.* selling him putrid meat or bad wine. In these cases the mayor would likewise summon persons of the trade of the man accused, as being well acquainted with the facts,

<sup>1</sup> Willoughby's Case, Cro. Eliz. 566 (1597); Reg. v. Wycherly (*supra*).

<sup>2</sup> These cases are to be found in Henry Thomas Riley's Memorials of London and London Life in the 13th, 14th, and 15th Centuries. Longmans, Green & Co., 1868.

<sup>3</sup> The following are some instances : —

Fishing nets with meshes smaller than those required by the trade ordinance : Riley, pp. 107 (1313), 135 (1320), 214 (1343), 219 (1344), 220 (1344), 483 (1385), 486 (1386).

Improper tanning of hides : Riley, pp. 135 (1320), 420 (1378).

False tapestry : Riley, pp. 260 (1350), 375 (1374).

Improper hats and caps : Riley, pp. 90 (1311), 529 (1391).

False pewter vessels : Riley, p. 259 (1350).

False gloves : Riley, p. 249 (1350).

False wine : Riley, p. 318 (1364).

and their verdict would decide and the mayor direct sentence accordingly.<sup>1</sup>

These cases at least show that in an urban community, where alone for the most part questions involving special skill would come up, the practice was well established in the fourteenth century of having the issue actually decided by people especially qualified.

The special jury continued as an institution of England. So we find in 1645<sup>2</sup> that the court summoned a jury of merchants to try merchants' affairs "because it was conceived they might have better Knowledge of the Matters in Difference which were to be tried, than others could, who were not of that Profession."

Blackstone speaks of the special jury as still an existing institution, though it had then for the most part been limited to cases where a "struck" jury is demanded owing to a supposed bias in the sheriff; a form of impanelling a jury which went under the same name as the jury of experts, and which exists to-day.

I mention this form of using expert knowledge, not because it is a feasible or practical means of solving our present question, but to show that our present method of using experts as witnesses was not the earliest or the only means used.

The second method mentioned above was to summon to the advice of the court certain skilled persons to help it out of its difficulties. I wish particularly to distinguish here between what we should to-day call matter of fact for the court and matter of fact for the jury. The cases I shall mention are those in which during a procedure incident to the conduct of a case there arose some question of fact which the court had to decide. That is, the court, having no rule of law to administer and not intending to establish any, had a mere question up of the decision of something in that particular case, and summoned experts to help it where its knowledge was lacking.

In 1345,<sup>3</sup> in an appeal of mayhem, the court summoned surgeons from London to aid them in learning whether or not the wound

<sup>1</sup> The following are instances of this:—

Selling putrid victuals, the prosecution being apparently public, no complainant appearing in the case: Riley, pp. 328 (1365), 408 (1377), 448 (1381), 471 (1382), 516 (1390).

Selling putrid victuals, private prosecution: Riley, pp. 226 (1351), 464 (1382).

Malpractice by a surgeon, whether the prosecution was public or private does not appear: Riley, p. 273 (1354).

<sup>2</sup> Lilly's Practical Register, ii. 154.

<sup>3</sup> Anonymous, Lib. Ass. 28, pl. 5 (28 Ed. III.).

was fresh. This was, however, in deciding whether or no the appellant should be allowed to go to trial at all. In 1506<sup>1</sup> it was discussed collaterally by the court and left in doubt whether the question of the appellant's wound, as permanent or not, was a proper question for the court or for surgeons. Perhaps the learning in the procedure of appeal of battle had become somewhat archaic in 160 years.

Again, in construing a bond in 1494,<sup>2</sup> which contained certain doubtful words, the court called to its assistance certain "masters of grammar," who incidentally failed to help it much. Again, in 1555,<sup>3</sup> we find the court saying that it is accustomed to call in grammarians to help it interpret the pleas before them when the court's Latin halts a little. The same usage became well established in the interpretation of commercial instruments,<sup>4</sup> and in the eighteenth century extended itself, as we know, not only from decisions made by the court upon the facts, but even to the rulings it made upon points of law. For example, Lee, C. J., in 1753,<sup>5</sup> charged the jury upon the liability of the parties in accordance with the opinion of certain merchants who had testified.

Lord Hardwicke also ruled in accordance with the views of the reputable merchants whom he summoned.<sup>6</sup>

Even Lord Holt, before deciding the celebrated case of *Buller v. Crips*,<sup>7</sup> asked the opinion of London merchants as to the effect of refusing negotiability to promissory notes.<sup>8</sup>

The real question that arises is how to put at the disposal of the jury the knowledge of experts in the decision of the issue. This, though a kindred question, should be sharply distinguished.

Before considering this question we must, however, try to discriminate between an expert witness and any other. First it must be remembered that an expert witness may have observed the actual facts upon which the issue turns; then he is able to testify to them as well as to his inference from them, and he may be therefore both a common and an expert witness in one. But it is not as a witness of facts at all that his position is peculiar; it is because as an expert witness he is allowed to testify to his con-

<sup>1</sup> Anonymous, 21 H. VII. 33, pl. 30.

<sup>2</sup> Anonymous, 9 H. VII. 16, pl. 8.

<sup>3</sup> *Buckley v. Thomas*, 1 Plow. 118.

<sup>4</sup> For such a case in 1649, see *Pickering v. Barkley*, Styles, 132.

<sup>5</sup> *Fearon v. Bowers*, 1 H. Black, 364, note a.

<sup>6</sup> *Ekins v. Macklish*, Ambler, 184 (1753), and *Kruger v. Wilcox*, Ambler, 252 (1755).

<sup>7</sup> 6 Mod. 29 (1703).

<sup>8</sup> See, also, a late case: *Chauraud v. Angerstien*, Peake, 43 (1791).



clusion from the facts, which he has either himself observed or which are in evidence from the testimony of others. His position is only peculiar in that a common witness is forbidden to testify to conclusions, and the history of the origin of expert witnesses must necessarily be simply the history of the exception in his favor to the rule that witnesses shall testify only to facts and not to inferences.

This is better explained by considering briefly the rise of the rule as to conclusions. It is common learning to-day that originally and indeed for many years the jury had no witnesses present before them at all. They went about before or during the trial informing themselves as they might of the facts at issue. Not until the middle of the fifteenth century was even the practice of summoning witnesses well settled as an incident to the trial, and it was still later that any compulsory process became available.<sup>1</sup>

That the rules of evidence are merely certain regulations to govern the evidence which the jury shall hear and that they are the offspring of the judicial control of the verdict, Mr. Thayer has made entirely clear. But these rules grew up but slowly and through the decision of judges, gradually eliminating certain material from the mass of what witnesses might say in court.

The rule that a witness shall not testify to mere opinion or conclusion is such a rule, and its origin no doubt was, if we could trace it, due to a gradual recognition by successive judges of the advantage of curtailing the trial and simplifying the issue by leaving out redundant matter. I call this redundant because in fact the opinion of the witness upon the issue can have no useful bearing on the case, and trenches on the jury's function. It is the jury that should form the opinion, make the conclusion and say truly — *vere dicere* — the fact, not the witness; he merely says what he knows. Therefore this rule of evidence — if in view of this it may be properly called such — is somewhat different from those which shut off certain facts actually probative of the issue. Moreover, it was recognized comparatively early in the history of rules of evidence. For we find Vaughan, C. J., that great defender of the right of juries to go "on their own knowledge," well saying in *Bushell's case* in 1671:<sup>2</sup> "The Verdict of a Jury and Evidence of

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<sup>1</sup> Mr. James B. Thayer, in his *Preliminary Treatise on Evidence at the Common Law*, pp. 122-136, concludes that the practice became established about the middle of the fifteenth century, though it remained an unimportant incident of trials for some time thereafter.

<sup>2</sup> Vaughan, 142, 22 Car. 2.

a Witness are very different things, in the truth and falsehood of them ; a Witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a Juryman swears to what he can infer and conclude from the Testimony of such Witnesses by the act and force of the Understanding, to be the Fact inquired after, which differs nothing in the Reason, though much in the punishment, from what a Judge, out of various Cases consider'd by him, infers to be the Law in the Question before him." The distinction cannot be put more plainly.

Yet in 1622 it had been said<sup>1</sup> that a witness could testify to the very issue involved, that he knew it to be true, if another testify to the circumstances in detail ; *i. e.* the conclusion of the witness upon the very issue is admissible if supported by other evidence.

I cannot find any other cases in the seventeenth century which seem to illustrate the rule that the conclusions of a witness are inadmissible as such. The rule would seem to be one obviously necessary early in the history of the control by the courts of trials, and it is very likely that many cases exist which illustrate the rule, but I think it may fairly be said that in Vaughan's time the citation above quoted shows that the rationale of the rule was well grasped, even if it was not always enforced.

As to the exception to the rule in favor of expert witnesses, of course that could not exist until the rule did ; for if the exception proves the rule, *a fortiori* the rule is a condition to the existence of the exception. I can therefore only cite several cases in which expert witnesses did testify, finishing by some cases where their testimony was consciously admitted by the court as an exception to the rule regarding conclusions.

In *Alsop v. Bowtrell*,<sup>2</sup> 1620, certain physicians testified that it might well be that a woman bore a child forty weeks and nine days after her husband's death, and yet it be his child, for the time might be delayed by ill usage and lack of strength. And so the court, agreeing with the physicians, delivered to the jury that it might be so. The case involved the legitimacy of the child. I think it should be noted in this, the first case which I have found of real expert testimony, — by which I mean a case where the conclusions of skilled persons were submitted to the jury, — that the witnesses are not stated to have been called on either side ; and from the meagre report we have, they seem to have satisfied the court in the

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<sup>1</sup> *Adams v. Canon*, Dyer, 53 b, note.

<sup>2</sup> *Cro. Jac.* 541.

first instance of the truth of their conclusion before the evidence went to the jury. The court finally found the general proposition to be true and delivered it as *datum* to the jury to use in their final conclusion.

In the Witches' case,<sup>1</sup> in 1665, Dr. Brown, of Norwich, was desired to state his opinion of the accused persons, and he was clearly of opinion that they were witches, and he elaborated his opinion by a scientific explanation of the fits to which they were subject. It did not appear in this case by whom Dr. Brown was called as a witness, and his position is doubtful for our purposes, though he spoke of a question of fact.

*Rex v. Pembroke*,<sup>2</sup> in 1678, is more instructive. This was a trial of murder, and the question was up as to the real cause of the deceased's death. Physicians were called on either side who testified under the examination of the attorney for the prosecution, or of the prisoner, both as to what were the causes of certain symptoms observed upon an autopsy they had seen and as to the general proposition as to whether a man can die of wounds without fever. It is true that the court took a hand in this evidence, but that is common enough to-day, and the only striking feature of the whole matter is in the fact that no one seemed to think it unusual. We must conclude from this that the rule excluding the conclusions of witnesses was not enforced often enough to make such a violation worth notice.

The same kind of case is found in the following year in *Rex v. Green*,<sup>3</sup> where a physician is called for the prosecution and testifies that the deceased could not have died from certain wounds upon his body, as they gave no blood, but that he must have died from being strangled. Still another case of the sort is *Rex v. Coningsmark*,<sup>4</sup> in 1682.

In Spencer Cowper's case,<sup>5</sup> in 1699, the question was whether the deceased had been drowned. Certain surgeons testified that they had examined the body and found no water in it, so that it must have been dead when it entered the water. Other surgeons answered in general to certain hypothetical questions as to whether a drowned body full of water would sink. In addition sailors who had been in sea fights testified to the same questions, an interesting addition which would hardly be allowed to-day.

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<sup>1</sup> 6 Howell, State Trials, 697.

<sup>2</sup> 7 Howell, State Trials, 185, 186.

<sup>3</sup> 13 Howell, State Trials, 1126-1135.

<sup>4</sup> *Ib.* 1337, 1338, 1340, 1341.

<sup>5</sup> 9 Howell, State Trials, 21.

In the eighteenth century the practice was certainly well established, and numerous instances of it can be found.<sup>1</sup>

In *Rex v. Heath*,<sup>2</sup> (1744), the court made a remark which is certainly significant of the general rule, though the exception to it was not noted. The trial was for perjury upon a former trial in ejectment, in swearing that Lady Altham had never had a child. The witness had testified that he had seen Lady Altham at one time with a "big belly." The counsel then asked:<sup>3</sup> "What do you apprehend became of that big belly?" On objection the court (Irish K. B., Marley, C. J., Ward and Blennerhasset, JJ.) said: "The apprehension of a witness is asked where no other evidence can be had in capital cases; as where a witness is produced to prove a wound given, he is asked whether he apprehends that wound was the cause of death. That must be asked, for he cannot tell otherwise. It is the best evidence that can be had in that case. But as to a fact, if you make the apprehension of a witness necessary, it takes away all proof of fact."

I confess that the last sentence is altogether enigmatical to me, but as to the first it shows that conclusions were as nearly "inadmissible" as was at that time known. Because it must be remembered that all through the eighteenth century the rules of evidence were unknown in the strictness that we apply them. Thus Baron Gilbert in 1760<sup>4</sup> lays it down that the only rule is that of the best evidence the case admits, and he would even admit hearsay when "corroborative" and not given as sole support of a fact;<sup>5</sup> so also Buller's *Nisi Prius*.<sup>6</sup>

Further we find in the trial of Lord Ferrers for murder in 1760,<sup>7</sup> where the defence attempted was that of insanity, that the admission of expert evidence was already subject to a rule we are now thoroughly familiar with, and one which presupposes, I think, considerable use of that form of testimony. Prior witnesses had testi-

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<sup>1</sup> Below are the cases that I have been able to find from an examination of Howell's *State Trials*, the usual edition of 1824: *Rex v. Kidd*, 14 Howell, *State Trials*, 137 (1701); *Rex v. Heath*, 18 Howell, *State Trials*, 68, 69, 70, 71, 73, 84 (1744); *Rex v. Blandy*, 18 Howell, *State Trials*, 1138, 1139, 1159 (1744); *Rex v. Canning*, 19 Howell, *State Trials*, 523 (1754); *Rex v. Stevenson*, 19 Howell, *State Trials*, 860 (1759); *Rex v. Ferrers*, 19 Howell, *State Trials*, 939, 940, 941 (1760); this testimony was, however, as to madness, and was given by laymen. *Rex v. Byron*, 19 Howell, *State Trials*, 1207 (1776).

<sup>2</sup> 18 Howell, *State Trials*, 70.

<sup>3</sup> *Ib.* 76.

<sup>4</sup> Gilbert on Evidence, 2d ed. London, 1760, *passim*.

<sup>5</sup> Gilbert on Evidence, p. 153.

<sup>6</sup> Buller's *Nisi Prius*, p. 294b.

<sup>7</sup> *Rex v. Ferrers*, 19 Howell, *State Trials*, 942-944.

fied to strange and supposedly insane acts of the defendant. A surgeon was then called and asked whether from all the facts he would say that the defendant was insane. The Crown counsel objected, and Lord Mansfield — the trial being of course before the Lords — directed the defendant that he might not put such a general question, but that if he would specify the precise facts, already in evidence, upon which he wished to base the surgeon's opinion, he doubted not that the Crown would not object. Whereupon the defendant put a number of questions based upon specific acts already in evidence, which the surgeon in each case testified were symptoms of insanity. To professional readers it may be in addition interesting to know that the jury, *i. e.* the Lords, seem to have preferred their own inference to the surgeon's, and convicted the defendant.

These are criminal cases, but in 1782, in a civil case before Lord Mansfield in *K. B.*,<sup>1</sup> a new trial was granted, because of the exclusion of the testimony of engineers as to their opinion of the cause of the filling of a harbor, alleged to be caused by a sea wall, which it was the object of the action to abate on information as a nuisance. It did not appear in this case whether or no the engineers had personally ever seen the wall or its effects, though perhaps it is fair to presume that they had. This case is, I believe, usually regarded as the first in which the point was raised.

In 1790, however, it was ruled by Lord Kenyon at *Nisi Prius*,<sup>2</sup> that experts might give what was merely opinion from facts in evidence, though Erskine, who was of counsel, took the point that their opinion was necessarily of less value than that of those who had seen the facts.

In 1795 in an edition of Gilbert on evidence prepared by Capel Lofft, an English barrister,<sup>3</sup> on page 301, I find an interpolation — which does not exist in the second edition published in 1760 — entitled "Of proof by experts" as follows: "The Proof from the Attestation of Persons on their professional Knowledge, we may properly, with the *French Lawyers*, call Proof by *Experts*."

"In proportion as *Experience* and *Science* advances, the uncertainty and danger from this kind of proof diminishes. . . .

"In general it may be taken that where Testimonies of professional Men of just Estimation are *affirmative*, they may be safely credited; but when *negative*, they do not amount to a disproof of

<sup>1</sup> *Folkes v. Chadd*, 3 Doug. 157.

<sup>2</sup> *Thornton v. The Royal Exch. Ass. Co.*, Peake, 25.

<sup>3</sup> Gilbert's "The Law of Evidence," edition of Capel Lofft, Dublin, 1795.

a charge otherwise established by various and independent circumstances."

This last seems to be a personal affirmation of Lofft's.

Finally Lord Ellenborough distinctly ruled upon the general question in 1807,<sup>1</sup> and that ruling will be the end for me of this historical comment, as that rule by him distinctly recognized the significance and bearing of the whole subject. The case was on a marine insurance policy, the defence being unseaworthiness. The defendant offered to call several eminent surveyors, who had not seen the ship, and who were to testify as to their opinion from facts in evidence. Garrow for the plaintiff objected that this was for the jury to decide from the facts, but was overruled, Lord Ellenborough saying: "As the truth of the facts stated to them was not certainly known, their opinion might not go for much; but still it was admissible evidence. The prejudice alluded to might be removed by asking them, in cross-examination, what they should think upon the statement of facts contended for on the other side."

There is one kind of evidence which is opinion evidence, and which ran along side by side with the cases I have mentioned, *i. e.* testimony from a comparison of hands, or from a conclusion drawn by the witness from his knowledge of former handwriting of the person supposed to have written the paper in controversy. It does not seem to me properly to concern our subject, though it is opinion evidence. There are instances, however, — and they have to-day become very common indeed, — when this kind of evidence is in the strictest sense expert, that is, where a comparison of documents is made by those peculiarly skilled in the comparison of hands. I have found no case of this earlier than 1792,<sup>2</sup> where post-office clerks testified as to whether a proposed will was in a natural or forged hand, and also as to the comparison between the document in dispute and a true memorandum.

Buller, J., in sustaining the evidence, cited *Folkes v. Chadd* (*supra*), and Lord Kenyon said he remembered a case where a decipherer gave an opinion without any grounds for it, which was enough to convict and hang the defendant. This was perhaps only a sporadic and unusual case,<sup>3</sup> and Lord Kenyon's opinion remained doubtful thereafter. Professor J. H. Wigmore does not regard the practice as really settled until the middle of this century, and then by statute. In so far as this species of evidence is expert evidence,

<sup>1</sup> *Beckwith v. Sydebotham*, 1 Camp. 116.

<sup>2</sup> *Goodtitle v. Braham*, 4 T. R. 497.

<sup>3</sup> J. H. Wigmore, 30 Am. L. Rev., note, p. 495 (1896).

therefore, I think it is safe to say it hinges on what I have already tried to trace historically, and is not to be connected with the rules as to handwriting or the subtleties relating to comparison of hands.

The upshot of this examination seems to be that the use of experts as witnesses existed when the present exclusive rules of evidence were not yet developed or enforced; that as the rule excluding the opinions or conclusions of witnesses took form, the use of experts being established and convenient, remained unaffected when other opinion evidence disappeared. What I have called the "exception" which expert evidence represents is therefore no more than a relic of the usage of an undeveloped age which had not so far differentiated witness from jury as rigidly to confine each to its function. The rise of expert testimony is no more than the gradual recognition of such testimony, amid the gradual definition of rules of evidence, as a permissible, because supposedly useful, archaism.

Having briefly considered the history of the present position of expert witnesses, the really practical question is whether it is the best way to use the information they can give. There are two things I wish to prove: first, that logically the expert is an anomaly; second, that from the legal anomaly serious practical difficulties arise.

As to the anomaly, there is perhaps no reason to expatiate much further. The expert is in effect not telling of facts at all, but of uniform physical rules, natural laws, or general principles, which the jury must apply to the facts.<sup>1</sup>

At the expense of some formal logic I wish to try to analyze the processes involved in this whole question, because I think that the anomaly I assert can only so be proved. In our system of law the pleadings should reduce the dispute between the contestants

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<sup>1</sup> I do not think it of importance here to attempt any absolute discrimination between fact and opinion. The distinction is in practice perfectly well observed, and it can serve no good purpose to deal with it at length. A comparatively slight acquaintance with formal metaphysics is enough to assure us that the apparently simplest "fact" is indeed a conclusion, involving in its affirmation an inference from certain impressions of the sense upon the assumption of a major premise, itself the creature of a past experience. At the risk of an irrelevant digression, I may say that in practice it appears to me we actually distinguish between so-called fact and opinion by merely a practical consideration, *i. e.* whether the inference is one which is within the fair range of dispute, or whether, given the impressions of sense, the inference from them is so self-evident as to make any attempt to question it frivolous. I call to witness here the common experience of every lawyer as to with how increasing rapidity one's questions approach the realm of "opinions" and "conclusions" as he approaches the issue in dispute.



to one or more propositions of fact, of which one side asserts the truth and which the other denies. For example, let us suppose a case of slander: A complains that B said he forged a note; B says the fact is that A did forge a note. This A denies. There is only one question of fact; did A forge a note? B seeks to prove it, A to deny it.<sup>1</sup> To prove this B will put in evidence ordinarily a number of facts from which he hopes that the jury will make the inference he wishes. For example, he will bring up H to say he saw A do it, F to say he heard A admit it, E to say that he, whose name appears on it, did not sign it, and so on. A will in turn bring up X to say that H was with him and far from A at the time, Y that F was mistaken in what he heard, Z that E had possession of the note with the signature on it.

The jury must answer the proposition by taking all these facts which have so come to their knowledge and applying to them the rules drawn from their common experience. Thus they will say: H is a brother of B's, X is a stranger to A. It is well known that a man's brother is more likely to lie for him than a stranger, therefore H is more likely to be lying than X, and therefore H did not see A forge the note. Again, F is a young man who was near A at the time, Y is somewhat deaf, and stood further away; a young man near by is more likely to hear truly than a deaf one; *ergo*, F heard truly what A said. So as between E and Z they will say, the mere fact of possessing a note is not in the general order of things much evidence that you signed it; at least where you deny you did. Lastly, they will say, where one is heard to admit he forged a note and where the supposed maker denies that he signed it, common experience tells us it was made by the one who admits it; this is the fact with A; *ergo*, A forged it.

In short, the major premise, *i. e.* that which consists of the general rule, the jury supply from their common knowledge; the minor premise, *i. e.* that which supplies the particular instance whose predicate is the subject of the major, the witnesses or other evidence furnish.

Now the trouble with the expert is that he takes the jury's place and contributes the major premise. For example, suppose the issue is the same as before, but B brings on M as handwriting expert, who says that whenever in two handwritings you find that the angle of inclination to the line is precisely the same, you may depend upon it, the same man wrote both. A puts on R, a phy-

<sup>1</sup> Strictly A's position is of course that B has not proved his proposition; this qualification we may disregard.

sician; who says that no man who has alcoholic tremor can hold a pen to write with, and that whoever has certain symptoms already in evidence, as those of A, has alcoholic tremor.

What should the jury do? Having no experience in the measurement of angles in handwritings, or, as we may hope, in alcoholic tremor and its effects and symptoms, they should take those generalizations into the stock of major premises which they apply to the facts, and using them, say whether A wrote the note or did not. Thus if they believe M, then, after measuring the angles in the note and in, say, the signature to the verification of the pleadings, if the angles are alike, they would conclude that the same hand wrote both; the angles are alike; *ergo*, the same hand wrote both. Or, with such symptoms A could not even hold a pen; he had such symptoms; *ergo*, he could not hold a pen, much less write.

Now the important thing and the only important thing to notice is that the expert has taken the jury's place if they believe him.<sup>1</sup> It is of course not necessary for the jury to accept the expert's opinion, but were it not really of possible weight with them, it would not be relevant, and if of possible weight, it is only because it furnishes to them general propositions which it is ordinarily their function and theirs only to furnish to the conclusion which constitutes the verdict.

So much, therefore, for the anomalous position of the expert witness. Whether it works any practical evil or not is a very different matter. There can be, in my opinion, no legal anomaly which does not work evil, because, forming an illogical precedent, it becomes the mother of other anomalies and breeds chaos in theory and finally litigation. No doubt, in our law under the supposed garb of equity and justice, much is constantly done no less anomalous, and I confess that to say of a thing in our law to-day that it is an anomaly is unfortunately to give it hardly any stigma, if a supposed immediate advantage is to be found from its existence. That the present position is not satisfactory to any one will, I believe, be admitted. True it is that some are found hardy enough

<sup>1</sup> It can hardly be necessary to say that as to the credibility of any witness there always must remain a question for the jury alone. They have to determine in each case the fractional coefficient of verity, to borrow from mechanics, and multiply the statements made before them by that fraction, before they can judge. Moreover in getting the personal equation of each witness, they shall use common sense or the general inferences of men under the circumstances, and will not be helped by any expert knowledge, at least only in rare cases, *e. g.* insanity or the malingering of insanity.

to support it,<sup>1</sup> but there are not many, and the criticism comes with great unanimity. I shall therefore try to point out the practical defects, as I believe necessarily inherent in the present system, hoping thereby to obtain a readier hearing than for any purely legal or logical difficulties.

The serious objections are, first, that the expert becomes a hired champion of one side; second, that he is the subject of examination and cross-examination and of contradiction by other experts.

Enough has been said elsewhere as to the natural bias of one called in such matters to represent a single side and liberally paid to defend it. Human nature is too weak for that; I can only appeal to my learned brethren of the long robe to answer candidly how often they look impartially at the law of a case they have become thoroughly interested in, and what kind of experts they think they would make, as to foreign law, in their own cases.

The main difficulty, the fatal difficulty, is, however, still further to seek, and lies in the logical fulfilment of the expert's position, as witness and not as adviser of the jury. The result is that the ordinary means successful to aid the jury in getting at the facts, aid, instead of that, in confusing them.

In the trial of an action or suit each party produces his witnesses and brings out from each witness certain facts the witness has observed. So far so good. The jury is in possession of any number of facts you will, all supposedly relevant to the inquiry. Cross-examination can be effective only in two ways: to bring out new facts, which does not change the function of the witness, or to contradict the witness's direct examination, which is itself no more than bringing out new facts which have inferential value in the final determination. Likewise when one witness contradicts another, the jury is still only getting new facts, new minor premises to be brought to test under the generalizations of common experience. In short all the methods of producing proof are simply directed to presenting all the diversified facts which can in any wise be relevant.

When an expert is on the stand what are the methods resorted to? Quite the same as when it is a witness. He is first examined in chief by the side which calls him. Assuming he has no direct evidence of facts to give, he must be plied with hypothetical questions, at as great length and in as great detail as seems necessary.<sup>2</sup>

<sup>1</sup> See William L. Foster, 11 HARVARD LAW REVIEW, 169.

<sup>2</sup> May I not say a word here for the much abused hypothetical question? As a mode of literature it is, no doubt, not to be commended, but I confess it seems to me

The object here is necessarily to supply such general propositions as shall be relevant to the issue ; *e.g.* whether under such and such a state of facts, the result favorable to one side or the other will usually or necessarily follow.

Assume that the expert has testified to a certain number of propositions expressing such general truths ; he is then handed over to the opposite side for cross-examination. There are two and only two possible efforts which the cross-examiner will make. First, he may seek to bring out other general propositions favorable to his contention ; second, he may seek to shake the validity of those already testified to. Similarly when it comes the turn of the opposite side to submit evidence, it has the same two possible objects, to introduce evidence showing the invalidity of what the opposite experts have said, or to bring out other general truths favorable to them.

The trouble with all this is that it is setting the jury to decide, where doctors disagree. The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own ? It is just because they are incompetent for such a task that the expert is necessary at all. Even where two supposititious propositions are not in direct conflict, the real reconciling grace which may lurk between them is not bestowed, save upon one familiar with the whole line of experience to which they belong ; and when the conflict is direct and open, the absurdity of our present system is apparent. The truth of either combatting proposition lies just in its validity as an inference from a vast mass of experience, not usually in any great degree that of the witness, certainly in no part that of the jury, as to the truth

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sometimes by no means so bad a method of ascertaining the truth as physicians and other experts insist. The necessity which they constantly, I might almost say persistently, disregard, is of the constitutional function of the jury as the final arbiters of the fact. Used as they are to make investigations untrammelled by legal machinery, experts naturally find much annoyance in giving out their conclusions piecemeal and as answers to questions of monstrous length and complication. Yet there can be not the slightest question that except in so far as their conclusions are based on the facts proved they are improper, and that the only way of ascertaining upon what facts they are basing their judgment is to lay before them in detail what are those assumed facts. To permit them to give a general opinion is no less than to make them judges not only of the matters in which they are skilled as general propositions, but of the truth of the facts to which these propositions are applicable, as to which they are in no sense more competent to decide than laymen. I have personally, however, found it altogether impossible to convince many gentlemen of this very obvious necessity.

of which trained powers of observation are quite essential, the result themselves of a life of technical training. What hope have the jury, or any other layman, of a rational decision between two such conflicting statements each based upon such experience. If you would get at the truth in such cases, it must be through some one competent to decide.<sup>1</sup>

This seems to me so entirely the source of the evil in the present system that I shall, even at the expense of some repetition, try to set it out more fully. We have seen that the expert is necessary and logical only to supply to the jury certain propositions of general applicability, or laws of nature, which are not the heritage of the ordinary man whom the jury, like the Greek chorus, heroically shadow forth. Knowledge of such general laws can be acquired only from a specialized experience such as the ordinary man does not possess, which must be either the experience of the expert directly or mediately from the experiments of other investigators. Therefore the validity of such laws or propositions can be tested, just as they themselves at the outset can be acquired, only by such as have possession of the specialized experience to which they relate either directly or mediately. The jury by hypothesis have no such experience directly, it being of a kind not possessed by ordinary men, and they cannot get it mediately, because the real acquisition of such experience involves a whole course of reading and practical experiment in the matter in hand, even to understand the terms or the methods of reaching conclusions. Therefore, when any conflict between really contradictory propositions arises, or any reconciliation between seemingly contradictory propositions is necessary, the jury is not a competent tribunal. Moreover, there can be no competent tribunal, except one composed of those who have possessed themselves of the specialized experience and the trained powers of observation necessary to bring to a valid test the truth of the various propositions offered.

What is it, then, that the jury need? A deliverance to them by some assisting judicial body of those general truths, applicable to the issue, which they may treat as final and decisive. Theirs is not, and in the nature of things cannot be, the function to decide

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<sup>1</sup> I hasten here to add that this does not, as it may here seem to imply, involve any infringement upon that "palladium of our liberties," trial by jury. No such change would be possible to-day. Trial by jury, like universal suffrage, has come to stay, whether we like it or not; we shall be fortunate to retain the right of a judge to decide the facts in equity cases. I shall try later to show how what is suggested in the text may not infringe upon trial by jury.

between two sets of such truths ; they want that general rule on which they can rely, and that given, they can use it as they use other rules of inference.<sup>1</sup>

One thing is certain, they will do no better with the so-called testimony of experts than without, except where it is unanimous. If the jury must decide between such they are as badly off as if they had none to help. The present system in the vast majority of cases — there being some dispute upon almost all subjects of human inquiry — is a practical closing of the doors of justice upon the use of specialized and scientific knowledge.

It is obvious that my path has led to a board of experts or a single expert, not called by either side, who shall advise the jury of the general propositions applicable to the case which lie within his province. The constitution of such an advisory tribunal is a matter which I shall not here discuss, as it is a question to be worked out very possibly in different ways at different places and times. But a few things, it seems to me, can be said.

First, to this tribunal would be transferred the present so-called expert evidence. Either side might call all the experts that money could procure or diligence discover, and put hypothetical questions for them to answer till the end of time. The right of cross-examination could be exercised without limitation. Only the difference would be that the final statement of what was true would be from the assisting tribunal.

One thing further, how of constitutionality ? Would it be constitutional to substitute such an advisory tribunal for the jury ? Two methods could be used, one to make its deliverances like findings of fact and decisive, to be taken *ex cathedra* by the jury as the judge's charge is to be taken ; the other, to leave to the august assemblage of our peers the sacred right of knocking their heads against the facts if they chose, and to regard the deliverances merely as "evidence" for them to "consider." I should certainly hesitate to call the first method constitutional, and at all events feel sure that the second is *safer*, undesirable though it be. Whether we like or not, our constitutions have the effect of perpetuating the institutions of the end of the eighteenth century in much detail, and while the question is one about which no one would wish to speak with certainty, it would seem that where the

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<sup>1</sup> I would again call to mind the case of *Alsop v. Bowtrell*, Cro. Jac. 14, where the court learned the fact of the physicians, and, having satisfied *themselves* of its truth, told the jury that they might so find it. Truly we have not in all respects advanced in two hundred and eighty years.

jury had always had the function of deciding upon the whole issue, including whatever general propositions it implied and whatever specialized experience it might take, it might well be an abridgment of the institution to take from them the ultimate decision in so far as such specialized knowledge was necessary to a conclusion.

But though the second of the two methods above mentioned seems the only one certainly constitutional, and though it is in addition much the less desirable, there is by the happy genius of our English institutions a way of dodging a difficulty we have not the power to face ; because, though the deliverance of the tribunal of experts might well be subject to be overruled by the jury, it could only be so overruled where a reasonable man acting reasonably and with regard only to such part of the evidence as he should regard and such law as the judge gives him, could reasonably have come to the result reached. In other words, as is well known, the jury can decide only to the extent of the reasonable field of dispute, and if they have obviously reached a result not fairly within that field, their verdict is "against the evidence" and cannot stand. Now I fancy that were the decisions of the supposititious tribunal only "evidence for the jury to consider," it would none the less be such kind of evidence as would destroy any practical field of dispute regarding the propositions laid down. Whatever witnesses might be called by either side and however divergent their testimony *inter se*, when the tribunal had once spoken, I much suspect the court would find no reasonable man could doubt but that it was thence came the truth, and that the jury must act accordingly.

But even if this be not true, and even if the court should refuse in this indirect way to take the matters into its own hands, much would have been gained. One has only to notice the scrupulous impartiality as to giving any opinion on the facts that our American judges observe, and the immense power of the English bench — which freely expresses an opinion on the facts — in influencing verdicts, to realize how great is the effect upon the jury, confused by the arguments of the two contestants, of some really impartial expression of an opinion upon which they can rely. Particularly would this be true when it came from one who did know, about something of which they did not know. Then though they *might* refuse the "evidence," in fact, they would not do so, except where passion and bias were the basis of their verdict, cases which the courts can usually control by granting new trials.

Therefore it would seem that even without a change in our constitutions and without any aid from the judges there could be ac-



complished much of what is really necessary for the effective use of expert knowledge.

It is obvious that much detail must be carefully considered, in particular, just in what cases it shall be necessary to institute such an advisory tribunal. For example, the case of value is one where it might be held wiser to retain the present practice, though value is a conclusion from specialized experience. Such matters it would seem could most wisely be left to the courts to decide in each case. The rulings of individual judges would soon form a line of precedents which would much better establish the most practical line of division than could be done by any degree of detail in legislative enactment. So also of the questions of practice which would arise, as to the form of the deliverances of the expert to the jury, whether like the judge's charge or in other form, and other incidental points of practice. Unfortunately such matters would, in many of our states, probably be regulated by statute, did anything of the kind here suggested ever succeed in becoming law ; because to-day we have apparently forgotten that it is to the judge one should look for rules to regulate how judges and attorneys should act, not to the legislature.<sup>1</sup>

*Learned Hand.*

ALBANY.

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<sup>1</sup> Reprinted from the Albany Medical Annals, November, 1900.

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**ACTIONS BROUGHT BY SOVEREIGNS.**—The rule that the courts of this country are open to sovereigns seeking judicial redress is as settled as the principle that a sovereign cannot be sued without its consent. The cases do not clearly recognize any well-defined principles concerning the question how far a sovereign submits to the jurisdiction of the court by bringing suit. The rule, it would seem, ought to be that the law should be applied as if the suit were between individuals, provided that such application does not infringe upon any well-recognized prerogative of sovereignty, or, if it so infringe, that the sovereign's express consent be shown. *King of Spain v. Hullet*, 1 Cl. & Fin. 333. But a prerogative that should be recognized is the immunity of a sovereign from an affirmative judgment in favor of the defendant. *People v. Dennison*, 84 N. Y. 272 (*semble*); *U. S. v. Hooe*, 3 Cranch 73, 92. This principle is based upon the same reason which exempts a sovereign from the suit of an individual; for it is contrary to the conception of sovereignty that a sovereign should be bound by the order of an inferior body. Hence a recent decision that a cross-libel cannot be entertained in answer to a libel by the United States for injuries in a collision to a government vessel is entirely sound. *Bowker v. U. S.*, 105 Fed. Rep. 398 (Dist. Ct., N. J.). The case, however, is instructive in pointing out a principle not often recognized.

In cases between individuals, where the court for some reason cannot give the defendant the affirmative relief which he would ordinarily receive, it is often possible to render substantial justice to both parties by the application of other judicial remedies. For example, in a suit in which a cross-bill for discovery could not be allowed, though the plaintiff in the original proceedings had access to matters necessary to the other party's defence, the original suit was properly enjoined until the discovery should be voluntarily given. *Atty.-Genl. v. Brookshank*, 1 Y. & J. 439. Similarly in a libel in admiralty, where the court had no jurisdiction to

entertain a cross-libel and the fault of both parties was shown to have caused the collision complained of, judgment for the libellants was entered conditional upon payment to the claimants of a moiety of the loss incurred. *The Seringapatam*, 3 Wm. Rob. 38. In similar cases, where a sovereign is plaintiff, the same practice should be followed, thus applying the general rule that in actions brought by sovereigns the law should be applied as between individuals, at the same time without infringing upon any prerogative of sovereignty. A condition precedent to the right to sue is not imposed, but the court acts in the only way in which it has authority to act. This result has practically been reached in several English decisions, though the principles suggested were not fully considered. *Prioleau v. U. S.*, L. R. 2 Eq. 659; *U. S. v. Wagner*, L. R. 2 Ch. App. 582. In these cases, however, the plaintiff was a foreign sovereign; yet the same rule should apply where the plaintiff is a domestic sovereign, since he also is entitled to no special privilege other than that mentioned. *U. S. v. Pacific R. R. Co.*, 105 U. S. 263.

In the principal case, therefore, it might well be within the discretion of the court to stay the original proceedings until the United States should consent to the filing of the cross-libel. But if both parties were at fault, judgment for the government should be entered only upon the condition of payment to the claimants of the sum to which they are entitled, even though such payment cannot be ordered. *The Seringapatam*, *supra*. See *The Sapphire*, 11 Wall. 164.

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CITIZENSHIP OF CIVIL LAW COMMERCIAL SOCIETIES.—The United States and Chilean Claims Commission, whose work is nearing completion in Washington, in the case of *Chauncey v. Chile* has recently dismissed the claim of Alsop and Company, a commercial society formed in Chile by American citizens, upon the ground that the treaty between the United States and Chile, 27 Stat. 965, gave the commission jurisdiction only over claims of citizens of the United States against Chile and of Chilean citizens against the United States, whereas the claim of Alsop and Company was on behalf of a citizen of Chile against its own government.

Alsop and Company belonged to that class of commercial societies known under the civil law, and hence under the law of Chile, as a *société en commandite simple*, in which some of the members have limited, and some unlimited, liability. In this respect, though differing in nearly every other feature, the company was analogous to an English or American limited partnership, which, unlike a corporation, does not constitute a juridical person under the common law rule. But the civil law makes no such distinction between the different forms of business societies, the *collectif*, the *commandite simple*, the *commandite par actions*, and the *anonyme*, the latter closely resembling our corporations. All four form juridical persons, either by express enactment, Civil Code of Chile, art. 2053, or by construction, Pont, Explication du Code Civil, § 814; and this personality continues even after the society, as in the principal case, has entered into liquidation. 2 Lyon-Caen et Renault, Droit Commercial, 241.

As far as corporations are concerned, the rule is settled that juridical persons take the nationality of the country where they are created and

have their domicile. *Long v. Commissioners*, 2 Knapp P. C. 51; *The Queen v. Arnaud*, 16 L. J. N. S. 50. Since the civil law societies, or so-called partnerships, are as much juridical persons as are English or American corporations, this rule was properly applied by the commission to a *société en commandite*. 2 Calvo, *Droit International*, 227, § 737; *Liverpool, etc., Co. v. Agar et al.*, 14 Fed. Rep. 615. The dissenting opinion of the Commissioner for the United States is based upon the erroneous conception that the civil law recognizes a distinction between business organizations similar to the common law distinction between corporations and partnerships. Ordinarily a government will not intervene on behalf of its citizens for injuries to a foreign corporation in which they are interested, upon the ground that such corporations are citizens of the country where created. U. S. Foreign Affairs, 1866, part iii. 522, 525. It is argued in the dissenting opinion that the application of this rule to civil law commercial societies, as in the principal case, gives unequal privileges to foreigners who form partnerships in the United States or England, and persons forming such a society as Alsop and Company in other countries. But this objection has no weight, since those who desire to carry on business in a foreign country where the civil law prevails can do so through partnerships or corporations formed in their native country. If business men desire to form companies in foreign countries they must accept the disadvantages as well as the benefits necessarily resulting. They do not become denationalized, but they choose to act through a foreign citizen. Furthermore, in such cases a citizen does not entirely lose the protection of his own government. *Le More v. U. S.*, 4 Moore International Arbitrations 3311.

The decision in the principal case is also of interest in connection with an anomalous rule applied by the federal courts. It is held, in an action by or against a corporation, where jurisdiction depends upon the citizenship of the parties, that the real parties are the stockholders, and that they are "conclusively presumed" to be citizens of the state or country in which the corporation was created. *Steamship Co. v. Tugman*, 106 U. S. 118. This legal fiction reaches a result identical with that of the principal case; but the rule of this case, that the corporation is the real party, and for purposes of jurisdiction is a citizen of the state or country where created, seems more logical, and is not without the support of authority. *Bank v. Deureau*, 5 Cranch 62, 89 (*semble*); *Louisville R. R. Co. v. Letson*, 2 How. 497.

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SCOPE OF THE REMEDY OF INTERPLEADER. — The equitable remedy by bill of interpleader seems always to have been regarded by the courts with peculiar jealousy and surrounded by unfortunate and unnecessary restrictions. This tendency is illustrated by a recent decision under a statute allowing interpleader by motion, the statute being, as is usual in such cases, construed as not extending the scope of the equitable remedy, but only introducing it under different procedure into courts of law. A purchaser, who was sued for the contract price of chattels sold and delivered to him, was denied the right to interplead his vendor and one Coleman, who claimed to be the owner of the chattels, which he alleged had been converted by the vendor. *Coleman v. Chambers*, 29 So. Rep. 58 (Ala.). One ground of the decision was that the adverse claims were not for the

same thing, that of the vendor being for the contract price, and that of Coleman for damages for conversion by the vendee. This objection would of course be final if the facts supported it. But it distinctly appears that Coleman claimed the contract price, and the inquiry should have been whether he showed any basis for such a claim. It would seem that one whose goods have been converted and sold in exchange for a contract obligation on the part of the vendee might by bill in equity enforce a constructive trust of that obligation, and thus claim the price from the vendee, if for any reason the legal remedy was inadequate. There are a few decisions involving the same principle in which the equitable remedy was allowed. *American Sugar, etc., Co. v. Faucher*, 145 N. Y. 552. *Cf. Kaufman v. Wiene*, 169 Ill. 596. Judging from the language of previous Alabama cases, and the nature of modern practice, the fact that the claim was equitable would be no objection to its introduction under the statutory interpleader, though there seems to be no conclusive authority on the question.

In this view of the case another question might arise. It has been repeatedly laid down as law in cases and text-books that a bailee, agent, tenant, or vendee cannot maintain a bill of interpleader against his bailor, principal, landlord, or vendor, and a third person claiming by independent or paramount title. Just what is meant by independent title is not entirely clear. As the rule is sometimes stated it seems to be based on the notion of a confidential or personal relation between the stakeholder and one claimant, which forbids the stakeholder to question the original right of that claimant, although it allows him to interplead the latter and a third person who claims to have acquired such original right by assignment, attachment, or other method, since its origin. 3 Pomeroy, *Eq. Jurisp.*, 2d ed., § 1327. The language of the courts which adopt this view, however, is broader than most of the decisions require, and other cases apparently rest the rule on a less artificial foundation, namely, the requirement that both claimants shall demand not only the same thing, but by virtue of the same debt or duty. It is said, for example, that a bailee's duty to his bailor and to a third person who claims the chattel merely as owner, are essentially different obligations. *Crawshay v. Thornton*, 2 Mvl. & Cr. 1. This gives the rule a logical basis, and explains most of the decisions; but even in this form the rule introduces a needless restriction, which the framers of the English Common Law Procedure Act took pains to eliminate from the statutory interpleader, and apart from statute the soundness of the decision in *Crawshay v. Thornton* has been doubted both in England and in this country. *Attenborough v. London, etc., Co.*, L. R. 3 C. P. D. 450, 456, 458; *Crane v. McDonald*, 118 N. Y. 648, 656. The case has been generally followed, but often with reluctance, and a few decisions apparently reject its principle altogether. *First Nat. Bank, etc., v. Bininger*, 26 N. J. Eq. 345; *Child v. Mann*, L. R. 3 Eq. 806. But accepting the principle of *Crawshay v. Thornton* as law, it would nevertheless follow that one who does not deny the validity of the obligation between the stakeholder and his principal or vendor, but attempts to secure to himself the benefit of that obligation on the theory of a constructive trust, claims, as against the stakeholder, by virtue of the same debt or duty, and not by independent title. A bill of interpleader has been allowed in such a case. *Goddard v. Leech*, Wright (Ohio) 476. In another case of the same sort the rule as to paramount title seems to have been rested on the less satisfactory ground

of the obligations imposed by a confidential relation, and the bill was dismissed. *Marvin v. Elwood*, 11 Paige 365. The opposite result was reached in the same state in a similar case where the trust was not constructive but express. *Richards v. Salter*, 6 Johns. Ch. 445. If the rule in question rests on identity of obligation it would not exclude an interpleader in the principal case. If it rests on anything else it is artificial, contradicted by a number of cases, and not likely to be generally followed.

The most troublesome objection to an interpleader in the principal case remains to be considered: the objection that if Coleman's claim was correct the vendee was a tort-feasor. It has been held in several cases that where one of the adverse claims is based on the commission of a tort by the stakeholder, the interpleader cannot be allowed. *Shaw v. Corster*, 8 Paige 339; *Hatfield v. McWhorter*, 40 Ga. 269. The refusal to deliver a chattel to either of two claimants, simply on the ground of the conflicting claims, followed at once by proceedings to make the claimants interplead, though involving a technical conversion, is not of course within the rule. But beyond that no distinction is made between intentional and unintentional torts. It is obviously just to refuse to a wilful wrongdoer the protection of a bill of interpleader, but where the stakeholder has acted conscientiously throughout and in perfect good faith, and now asks only to be allowed to determine in the surest manner which claimant is entitled, the rule which denies him such relief on the ground of a technical tort seems altogether inequitable. Unfortunately, however, there seems to be no authority on the other side, and the Alabama court was amply justified in following the established rule.

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IMPOSSIBILITY OF PERFORMING CONTRACTS AS A DEFENCE. — Impossibility was originally regarded as in no case an excuse for the non-performance of a contract. To this general rule three well-recognized exceptions have arisen. A defence is admitted where, without fault of either of the contracting parties, performance has been prevented by the destruction of the subject-matter of the contract, by a new law forbidding the act promised, or by the sickness or death of one of the parties to a contract for personal services. Further exceptions the English and most of the American courts have not allowed. *Ashmore v. Cox*, [1899] 1 Q. B. 436. The New York court, however, has of late been more liberal, and in a somewhat indefinite way has laid down the doctrine that impossibility is an excuse when caused by the non-continuance either of the subject-matter of the contract or of the conditions essential to its performance. *Stewart v. Stone*, 127 N. Y. 500; *Dolan v. Rodgers*, 149 N. Y. 489; *Herter v. Mullen*, 159 N. Y. 28. In line with this rule is a recent decision of the same court. *Buffalo, etc., Land Co. v. Bellevue Land, etc., Co.*, 165 N. Y. 247; 59 N. E. Rep. 5. On selling certain land to the plaintiffs, the defendants contracted to build an electric railroad near by, on which they would run cars as often as every half hour, and they further agreed that in case this promise were broken, they would buy back the land. The plaintiffs requested that the defendants be compelled to fulfill this last promise, they not having run cars according to agreement. The court held the defendants' plea, that extraordinary snowstorms had compelled them to suspend operations for a time, was a good defence, on

the ground that even if the contract was absolute in form, yet it contained an implied condition that, if performance were rendered impossible without the defendants' fault, they should be relieved of liability.

The exceptions to the general rule that impossibility of performance is not a defence have crept into the law, not as excuses, but under the cover of implied conditions. In other words, the courts have held that the parties impliedly agreed there should be no performance if such contingencies arose, and so, in truth, no breach of contract resulted. This cannot be regarded otherwise than as pure fiction. As a matter of fact all thought of impossibility of performance is usually absent from the minds of the contracting parties. The defence is an equitable one, and therefore, provided beneficial results follow, the courts would be justified in holding that the implied condition relieves liability, not only where the subject-matter of the contract has been destroyed, but also where the means of performance have ceased to exist; that is, in general terms, wherever performance is rendered impossible without fault of the promisor. Indeed, even if it is insisted that the condition must be one actually intended, it seems more likely that the broader condition would be in the parties' minds than the narrower one, limited to definite objects.

It is usually to the interest of both parties that a contract be carried out. Where performance is prevented by an event, against the occurrence of which neither can reasonably be held to have warranted, both suffer a loss for which neither is responsible. In such circumstances it seems highly unjust to throw all the loss on the one whose performance may happen to have been interfered with. Much wiser would it be to excuse the breach of the express contract, and allow a recovery for benefits actually rendered in a quasi-contractual action. Had this latter remedy been earlier recognized, it is not improbable that the courts would, before this, have admitted impossibility generally as a defence. This result may now be reached, however, by the adoption of the rule suggested by the New York court, which seems not only a natural successor of the previously recognized exceptions, but likewise eminently just.

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THE RIGHT TO DISPOSE OF THE BODY BY WILL. — An interesting question of first impression arises in a recent California case as to whether or not one can make a valid testamentary disposition of his body. A testator living with the defendant at the time of his death left a will urging that the manner, time, and place of his burial should be according to the defendant's wishes and directions. Under this clause the defendant claimed the right of burial, and the widow and daughter of the deceased brought suit to obtain possession of the body. In allowing a recovery the court decides that a corpse is in no sense property, that therefore it cannot be disposed of by will, and that the right of burial belongs, in the absence of statutory provision, to the next of kin. *Enos v. Snyder*, 63 Pac. Rep. 170 (Cal.). Though it has been held that a corpse is a species of property, *Bogert v. Indianapolis*, 13 Ind. 138, such a view, it would seem, is erroneous, and not in accordance with the great weight of authority. *Fox v. Gordon*, 16 Phila. Rep. 185. One cannot be indicted for the larceny of a corpse, *Rex v. Haynes*, 2 East P. C. 652; nor can the body, as in olden days, be detained for the payment of debts. *Reg. v. Fox*, L. R. 2 Q. B. 246. But it is to be noted, though curiously enough it is not



even suggested in the principal case, that whether a corpse be regarded as property or not is immaterial to the point at issue. For when we consider that property in a body can only begin when the living becomes inanimate, it necessarily follows that property in one's own body can never arise. It must be conceded, however, that a dead body is something of which we can predicate a right of possession for the purposes of burial. Whether we call that right a *quasi* property right or not is a matter of terminology which does not concern us. The vital question remains, Can a testator by any possible testamentary act govern the vesting of that right?

Even in the absence of testamentary disposition there is some confusion in the law as to who has the right of burial. The principal case is perhaps in accordance with the general rule in this country, that it belongs to the next of kin. *Wynkoop v. Wynkoop*, 82 Am. Dec. 506 (Pa.). It is held in some jurisdictions, however, that the surviving widow or widower has the right. *Hackett v. Hackett*, 18 R. I. 155.

Equity has also interfered in determining the right as between the widow and the next of kin. *Snyder v. Snyder*, 60 How. Pr. 368. The courts limit their decisions in regard to the right of burial, however, expressly to those cases where there is no testamentary provision, and the inference is that a testator may, if he sees fit, govern the vesting of this right. There are *dicta*, also, which seem to recognize such a power. *O'Donnell v. Slade*, 123 Cal. 585; *Pierce v. Swan Pt. Cemetery*, 18 R. I. 227. In the former case it is distinctly stated that an individual has a sufficient proprietary interest in his own body after death to make a valid and binding testamentary disposition of it, and in the latter it is said that such a doctrine has been recognized. In neither case, however, is the point involved. On the other hand, in England, such a doctrine has been denied, where the court rested a decision on the ground that it was impossible by will or any other instrument to dispose of one's body. *Williams v. Williams*, 20 Ch. D. 659. It would seem, then, though there are *dicta* to the contrary, that courts have never recognized nor given effect to such a testamentary disposition, and though perhaps it may appear that under some circumstances effect should be given to the wishes of the deceased, it is difficult to suggest on what principle this can be done.

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THE NECESSITY OF NOTICE TO A GUARANTOR. — A recent Massachusetts decision presents an interesting and able discussion of the effect on a guarantor's liability of a failure by the guarantee to give notice of the default of his principal. The guaranty in this case was of the payment of rent by a lessee of the plaintiff. The guarantor received no notice of the lessee's failure to pay till fourteen months after the default occurred, and in consequence of the delay was in a worse position. Nevertheless he was held on his guaranty. *Welch v. Walsh*, 59 N. E. Rep. 440 (Mass). The decision goes on the ground that the guarantor, having undertaken to have a certain thing done at a certain time, is bound to see it done, and the lessor is under no duty to notify him of default. This reasoning seems sound. *Rogers v. Burr*, 97 Ga. 10. It is commonly held that notice is not necessary to charge a guarantor if he has suffered no detriment. *Reynolds v. Douglas*, 12 Pet. 497. But it is often said that the guarantor would be discharged to the extent of any loss which he

would suffer from not having had notice. *Bank v. Drake*, 79 N. W. Rep. 121. The cases in which this statement is made, however, are almost universally cases of continuing guaranties. Nevertheless, in Massachusetts, it is clearly settled that lack of notice of default to a guarantor of a promissory note discharges him to the amount of the resulting injury. *Bank v. Haynes*, 25 Mass. 423. Such, also, seems to have been the early English law. *Philips v. Astling*, 2 Taunt. 206. See, also, *Tiffany v. Willis*, 30 Hun 266.

As to the cases of continuing guaranties, there may well be a different rule. For in such cases the time when the liability accrues is uncertain, and often peculiarly within the knowledge of the person receiving the guaranty. The subject-matter, also, is not one definite act. On the other hand, in the principal case, the guarantor could be in no doubt as to when, if at all, his liability accrued, nor for what he was liable. If the tenant does not pay at a settled time, the guarantor is bound, whereas, in the case of a continuing guaranty, it is impossible for him to tell when a default may occur. The argument from analogy, therefore, is weakened. Moreover, the few authorities found directly in point, aside from the promissory note cases cited, appear to be in accord with the principal decision. *Heyman v. Dooley*, 77 Md. 162; *Hungerford v. O'Brien*, 37 Minn. 306; Ames, Cas. Suretyship, 239. If notice is desired as a matter of business convenience, it may always be stipulated for in the contract, and in the absence of any such stipulation, the result reached in the principal case seems sound.

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JURISDICTION IN DIVORCE PROCEEDINGS. — The judgment in divorce proceedings operates directly upon the status of the parties, and thus it is everywhere recognized that jurisdiction in such proceedings belongs only to the state where the parties are domiciled. *Sewall v. Sewall*, 122 Mass. 156. In general, from the nature of the marriage relation, the domicile of a married woman follows that of her husband. *Barber v. Barber*, 21 How. 582. For purposes of divorce, however, an exception has been made, the wife being allowed to sue for separation at the domicile of the marriage, even though her offending husband had acquired a new domicile. *Harteau v. Harteau*, 14 Pick. 181. It would seem that this exception, however, required no further extension in order to fulfil its object of protecting the wife against the injustice of being compelled to follow a husband to every new domicile in order to obtain her freedom. Yet nearly everywhere in this country she is allowed to acquire a new and separate domicile for the purpose of instituting divorce proceedings, though for that purpose only. *Hunt v. Hunt*, 72 N. Y. 217. This doctrine has given rise to certain difficulties, not always satisfactorily treated by the courts, which are well illustrated by a recent New York decision. A wife left her husband who was domiciled in New York, and went to Oklahoma for the purpose of obtaining a divorce. On obtaining this she remarried and returned. Subsequently, on suit for divorce by the original husband in New York, it was held that this foreign divorce was invalid and no defence to this suit. *Winston v. Winston*, 165 N. Y. 553.

The decision follows the settled New York rule that a judgment of divorce against a non-appearing, non-resident defendant has no effect upon the latter's status, since it is granted without personal service. Yet

if there is jurisdiction over the plaintiff, as must be the case if she has acquired a domicile, the decree will be effective as to her status, and consequently under this rule the husband is married but the wife is not. *People v. Baker*, 76 N. Y. 78. See *Dunham v. Dunham*, 162 Ill. 589, 606. The difficulty of service on which this New York doctrine is based is, however, purely imaginary, and the Supreme Court has very recently quite properly overruled this doctrine so far as it concerns the states of this country, on the ground that it does not give full faith and credit to the decrees of another state. *Atherton v. Atherton*, U. S. Sup. Ct.; decided April 15, 1901. Jurisdiction for divorce is more properly not personal, but *quasi in rem*, and therefore no personal service is required, but only the best possible practical notification to the defendant of the pendency of the suit. *Doughty v. Doughty*, 27 N. J. Eq. 315; Minot, Conflict of Laws, §§ 87, 94. This follows from the source of the jurisdiction and the nature of the subject-matter. For, since domicile of the plaintiff gives jurisdiction over her status, if the decree is to have any effect at all, it must likewise operate upon that of the defendant, as the status is a correlative one and cannot exist except there be two parties to it. But this personal element of the proceedings cannot be entirely disregarded, and thus it is only requisite that the defendant be given a reasonable chance to come in and defend the suit. If this is done, the decree is valid and entirely dissolves the marriage.

The invalidity of the decree in the above case, however, may be readily supported upon another ground, not adequately noticed by the court. It appears that no domicile was ever obtained in Oklahoma by the wife, and thus on this ground the decree was clearly void as to all parties. No domicile can ever be acquired by a person going to another state merely with the intention of obtaining a divorce and then returning, for there cannot be found in such cases the requisite *bona fide* intention to make a permanent change of home. *Fennison v. Hapgood*, 10 Pick. 77, 98. It makes no difference that the statutes of the state provide for granting of divorces upon a residence within the state of a fixed number of days. That can give no jurisdiction which another state ought to recognize. Divorces granted in all such states except to parties *bona fide* domiciled therein are utterly void, and should be fearlessly treated so everywhere. *Bell v. Bell*, U. S. Sup. Ct.; decided April 15, 1901. Such action would have a wholesome effect upon the all too loose divorce conditions existing in this country to-day.

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CONTROVERSIES BETWEEN STATES. — When the Constitution was first adopted, the individual states comprising the Union gave up many rights usually enjoyed by independent states, as, for example, the right to make treaties or to declare war. In view of this, the Constitution gave the United States Supreme Court jurisdiction in all suits to which a state should be a party, and thus virtually put the states on the same footing as private corporations in regard to the right to sue or be sued. But under this clause suits were brought against states by private individuals, and as this was thought to infringe upon their rights as sovereign states, the Eleventh Amendment was passed taking away from the United States courts their jurisdiction in such cases. This amendment has, however, introduced an interesting question as to what may constitute the subject-

matter of suits between states. Questions of boundaries have formed the most common disputes before the United States courts. *Rhode Island v. Massachusetts*, 12 Pet. 657. It has been held, however, that no private citizen can use the name of his state to enforce a private claim against another state. *New Hampshire v. Louisiana*, 108 U. S. 76.

In this connection a recent decision by the Supreme Court is of interest. The State of Missouri, fearing that the operation of a drainage canal built by the State of Illinois would be injurious to the inhabitants of Missouri, filed a bill before the Supreme Court to enjoin such a use of the canal. The State of Illinois demurred, claiming that the State of Missouri was only nominally a party, and as the real parties plaintiff were the riparian proprietors on the Mississippi River, the action was contrary to the Eleventh Amendment. The court held, however, that it was an injury to the state as such, and overruled the demurrer. *Missouri v. Illinois*, 21 Sup. Ct. Rep. 331.

In view of the fact that the Mississippi River is a navigable stream, the decision seems clearly right. The bed of the stream is owned by the state, and is held for the benefit of the public generally. But as in the case of a park or a highway, the state is the legal owner of the fee. When, therefore, an act is done which diminishes the value of the river, the state is directly injured as a state, and it is the proper plaintiff in an action to abate the nuisance. The nuisance here is such that, if done within the state by a private citizen, the attorney-general would be the proper official to proceed in behalf of the state. This fact suggests a satisfactory standard of judging where to draw the line. Whenever the act is one which, done by a private citizen, calls for the interference of the attorney-general, then such an act, done by a state, may be the basis of an interstate dispute sufficient to give the federal courts jurisdiction. This test would doubtless be good as far as property rights of a state or rights as sovereign are infringed. It may, however, be objected that the people as such are sometimes injured when the state as a state is not affected, and that in such cases the attorney-general proceeds in behalf of the public generally. As, for instance, where a public corporation, acting in excess of its chartered powers, gains such a monopoly in trade as to threaten the public interests. *Attorney-General v. Great Northern R. R.*, 1 Drewry & Smale, 154. A careful examination of the attorney-general's authority, however, shows that in such cases, he does not directly represent the public, but acts as agent of the sovereign, who, as *parens patriæ*, is the proper one to guard such interests. Although the action is in the name of the attorney-general, the state in reality is the interested party. *Jackson v. Phillips*, 14 Allen, 539. This being so, the rule suggested seems both safe and practicable.

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RIGHTS IN PUBLIC PONDS. — Although comparatively little has as yet been written about the law of ponds, the decisions are hopelessly confused. This is largely due to the fact that, while the tests applied in the law of watercourses are too narrow to be applied to ponds, the courts have tried to carry them over. As an instance of this confusion, in England, it is held that the public have no rights whatever in ponds, while, on the other hand, in Massachusetts, it is said that all large ponds belong to the public, and littoral owners have no property rights in them

*Bristow v. Cormican*, 3 App. Cases, 641; *Wattuppa Co. v. Fall River*, 147 Mass. 548. Both these positions, however, are extreme, and neither represents the prevailing American doctrine. It may be doubted whether it is safe to say that there is a common doctrine, because in each jurisdiction the development is in some respects peculiar. But as far as large navigable ponds are concerned, almost all agree that the public have many rights in them similar to those they enjoy in navigable rivers. Gould on Waters, 3d ed., § 82. Some interesting questions concerning these rights of littoral owners and the public were raised in a recent Minnesota case. The defendant, for commercial purposes, cut a large amount of ice; as a result the natural level of a public pond was lowered, causing substantial damage to the littoral owners. The court held that while the public had a right to cut ice on public ponds, yet this right was in each instance personal, and to take so large an amount for the purposes of sale was an unreasonable exercise of the right. *Sanborn v. People's Ice Co.*, 84 N. W. Rep. 641.

The right of a littoral owner was of course involved, and the decision of the court that he has special property rights seems commendable and timely. In dealing with rights which are peculiarly public, such as the right to fish or to navigate, it is often said that a shore owner on a pond has no greater right than any other member of the public. *Brastow v. Rockport Ice Co.*, 77 Me. 100. In each actual case the statement is doubtless true, but its form is too broad and sweeping. There are of course fewer opportunities to injure a shore owner on a pond than on a river, and the incidents of such ownership are less valuable in the case of a pond. But there are certain well-defined incidents of littoral ownership on a pond which it is only just to allow the proprietor to hold as property. Such incidents are the rights of access, to accretion, and to have the water remain in its natural state subject only to reasonable use by others; and as far as these are concerned there is no reason why the law should not treat the littoral as well as it does the more fortunate river-bank owner. 3 HARVARD LAW REVIEW, 1.

The distinction which the court makes between a taking for personal use and for commercial purposes may, however, well be doubted. This right to cut ice is public, and is very similar to the right to fish; in fact, it is only another application of the common right to the beneficial use of the pond. Doubtless no one would contend that the right to take fish from public waters is personal, and it is hard to distinguish between that and the right to cut ice. Moreover, no authority for the distinction has been found. But it has often been held that there are limits to this public right. Water cannot be taken from a pond by artificial means so as to injure a riparian owner on an outlet stream. *Concord Mfg. Co. v. Robertson*, 66 N. H. 1. But no satisfactory test has been given to determine what is a reasonable use. If it were a case of taking water from a navigable stream by a member of the public, doubtless he would be restricted to the same amount as is allowed a riparian owner for other than domestic uses; that is, to such an amount as shall not perceptibly diminish the flow. Drawing an analogy from this, it is suggested that it might be well to limit the public to such a use as shall not injure or diminish the pond as a pond, and that any use resulting in perceptible diminution is both unreasonable and unlawful.

**ASSIGNMENT OF LIENS.** — Common law liens depend for their validity on the detention of goods solely as security for the payment of the lienholder's claim. By an unauthorized sale or pledge of the goods, by a voluntary delivery to the true owner, or by a wrongful claim of title, they are regarded as dealt with for a purpose inconsistent with this sole right, and the lien is destroyed. Since, then, the goods may be held only for the payment of a personal claim, it follows that a lien is a merely personal right, and therefore not assignable so as to vest a legal right to the lien in the assignee. A recent case holds that any attempted assignment for the benefit of another is not only invalid, but destroys the lien. *Glascock v. Lemp*, 59 N. E. Rep. 342 (Ind.). A livery stable keeper, having a lien on a horse for the payment of his board, assigned the claim, together with the horse as security therefor, to the defendant. The owner replevied the horse, and the court held that the purported assignment constituted no defence, as it destroyed the lien. The decision is in accord with the few cases in point. *Ruggles v. Walker*, 34 Vt. 468. It is difficult to see on what legal principle the lien can be held destroyed by such a transaction. The assignment of the chose in action gives the assignee, in contemplation of law, merely a right to sue on the claim in his assignor's name. Even though by statute the assignee may prosecute the suit in his own name, the change is one of procedure merely, and the chose in action is still legally held by the assignor. Therefore, when a chose in action is assigned, together with goods on which a lien exists for its protection, whatever may be the rights to the custody of the goods as between assignor and assignee, the latter must be considered as detaining them from the owner solely for the protection of his assignor's legal right to the chose in action. In a suit by the owner of the goods against the assignee for their detention, such as in the principal case, there should be the same defence as is accorded any lienholder's bailee, for both may truly say that the goods have never been treated otherwise than as security for the original lienholder's claim.

A further question is suggested, namely, whether the assignee would be entitled to hold the goods as against his assignor. Clearly the parties impliedly agreed that the assignee should have exclusive right to possession until the lien debt was satisfied. As any retaking would, therefore, constitute a breach of the contract under which the custody of the goods was transferred, the assignee ought to be allowed to assert his rights to possession, like any bailee entitled to possession for a period of time. Such a dealing with the goods, as before stated, would not destroy the lien, because it would be entirely consistent with a detention solely as security for the chose in action. Thus to an action for the goods by the owner, the assignee could interpose the lien as a defence, to an action by the assignor, his contract right to possession. In accord with this view are several *dicta*. *Pugh v. Bigler*, 62 Pa. 242; *Buckner v. McIntroy*, 31 Ark. 631. To call such a transaction an assignment of a lien is strictly inaccurate, since the lien, being legally unassignable, would still exist in the assignor. The right to the actual custody of the goods alone would be transferred, yet as the results of an actual legal assignment would thus be practically attained, and as the phrase is similarly used in connection with choses in action, it will serve the present purpose.

Ever since the first recognition of liens in the time of Edward IV., then known as rights to detain, their effect has been regarded as beneficial. By the recognition of custom, by equity, and by statute, the common law

rights, or rights analogous, have been widely extended. Such an assignment of liens as is suggested seems merely to give proper effect to such rights. It can make no difference to the owner of the goods to whom he must pay his indebtedness, and whether the goods are in the hands of an assignee or a bailee, he can still hold the original lienholder responsible for their safety. On the other hand, it may be of the utmost importance to the lienholder that, by an assignment which gives his assignee all the rights he himself possesses, he can at once raise funds on a just debt. Under these circumstances, since no distortion of legal principles nor perversion of policy is involved, such assignments of liens ought to be recognized.

## RECENT CASES.

**AGENCY—DAMAGES—PUNITIVE DAMAGES FOR AGENT'S TORT.**—The plaintiff came to the defendant's place of business with a wagon load of goods to sell. The defendant's servant ordered him to leave the premises, and on his refusal, struck him in an unjustifiable manner. *Held*, that in an action against the master, punitive damages were properly awarded. *Boyer v. Coxen*, 48 Atl. Rep. 161 (Md.).

The doctrine of punitive damages is opposed to sound legal principle, but is nevertheless supported by the weight of authority. See 2 GREENL. EV., 16th ed., § 253, n. 2. The object of such an award is to punish the defendant and thus protect society against wanton violations of personal rights and social order; therefore, some wilful or malicious wrongdoing by the defendant is generally held necessary. *Volts v. Blackmar*, 64 N. Y. 440. The express authorization of the servant's tort by the master, and perhaps the employment of a palpably unfit man, may be regarded as making him sufficiently culpable; otherwise however punitive damages should not be awarded against him. *Burns v. Campbell*, 71 Ala. 271, 292. The principal case rests upon the theory that all the servant's acts within the scope of his employment are, in the contemplation of the law, the acts of the master. Punitive damages however are given, not as compensation for the injury resulting from the act, but as punishment for the evil motive, and of that the principal here is innocent. Accordingly, even if we accept the doctrine of punitive damages, the principal decision seems unjustifiable. *Grund v. Van Vleck*, 69 Ill. 478; *Haines v. Schultz*, 50 N. J. Law, 481.

**AGENCY—IMPLIED WARRANTY OF AUTHORITY—FORGED POWER OF ATTORNEY.**—A stockbroker, acting in good faith under a forged power of attorney purporting to be signed by one Oliver, effected a transfer of stock standing in the Bank of England in Oliver's name. The bank, having made good the loss to Oliver, sued the stockbroker. *Held*, that the stockbroker is liable on an implied warranty of authority, even though the bank had equally good means of knowing of the forgery. *Oliver v. Bank of England*, 17 T. L. R. 286.

This decision is of importance to the business world, and is interesting in its application of the well-known doctrine of *Collen v. Wright*, 8 E. & B. 647. Theoretically it would seem that the action should be in tort, there being no contract. As there is no such action for innocent misrepresentation however, courts have implied a warranty of authority. *Firbank's Executors v. Humphreys*, 18 Q. B. D. 54. This doctrine, though generally acknowledged, has been modified where the agent makes a full disclosure of the facts concerning his authority. *Lilly v. Smales*, [1892] 1 Q. B. 456; *Newman v. Sylvester*, 42 Ind. 106. The principal case, it would seem, does not come within this exception. On similar facts the doctrine of implied warranty has been held to apply. *Boston, etc., R. R. v. Richardson*, 135 Mass. 473. Though such an application extends the doctrine of *Collen v. Wright*, *supra*, to cases where one not in reality an agent purports to act as such, it would seem to be correct. The rule which the principal case establishes is practical and in accordance with sound business principles, though in fact it is but a veiled exception to a settled principle in the law of torts. *Farmers' Coop. Trust Co. v. Floyd*, 47 Oh. St. 525.

**BANKRUPTCY — NOTES — PROOF AGAINST MAKER AND INDORSER.** — The Bankruptcy Act of 1898, § 65 c, provides that where a claim is proved and allowed after a dividend has been declared, it shall not affect such dividend, but if sufficient remains after the payment of the latter, the creditor shall receive an equal dividend before other creditors are paid further. The maker and indorser of a note were both bankrupt. The holder had proved against the estate of the maker after a dividend had been declared. *Held*, that he may prove against the estate of the indorser for the full amount of the note. *In re Swift*, 106 Fed. Rep. 65 (Dist. Ct., Mass.).

Where the maker and indorser of a note are both bankrupt the holder may prove against both for the full amount. *In re Meyer*, 78 Wis. 615. But where, before proving against the indorser's estate, he has proved against the maker's, and a dividend in his favor has been paid or declared, his proof against the indorser's estate must be reduced by so much. *Sohier v. Loring*, 6 Cush. 537. The present case decides correctly that the creditor's right to a preference in future dividends is not equivalent to a dividend declared in his favor, since it is uncertain how much, if anything, he will receive from the maker's estate. A right that is for any reason uncertain will not operate to reduce his claim. *In re Hicks*, Fed. Cas. No. 6456.

**CARRIERS — CONNECTING CARRIERS — POSSESSION.** — Before a train reached its destination an express company's agent took a baggage-check from a passenger, entered the baggage-car, as was his custom, and tied the check to the passenger's trunk. Between that time and its delivery by the express company, the trunk was robbed. *Held*, that the express company is liable to the passenger for the loss. *Springer v. Westcott*, 166 N. Y. 117; 59 N. E. Rep. 693.

The lower court went on the principle that the last of a series of connecting carriers must rebut a presumption that goods were received by him as delivered to the first carrier. *Moore v. N. Y., etc., R. R. Co.*, 173 Mass. 335. This doctrine is believed to be unsound. *Marquette, etc., R. R. Co. v. Kirkwood*, 45 Mich. 51. However it is law in several jurisdictions, of which New York has been supposed to be one. *Smith v. N. Y., etc., R. R. Co.*, 41 N. Y. 620. The present case seems within this rule. But the upper court rested its decision upon another ground, holding the express company liable from the moment its agent attached the check, seemingly on the principle that a common carrier becomes liable as such on taking possession, at a point off his route, of goods consigned to a place thereon. *Evansville, etc., R. R. Co. v. Androsscoggin Mills*, 22 Wall. 594. An ordinary express messenger undoubtedly has possession of parcels in an express car. *Buckland v. Adams Ex. Co.*, 97 Mass. 124. But the facts of the principal case are entirely different and show no possession by the agent at the time in question. The position taken seems therefore untenable. The case is interesting as showing a disposition not to follow *Smith v. R. R. Co.*, *supra*.

**CONFLICT OF LAWS — DIVORCE — JURISDICTION.** — The defendant obtained in Oklahoma a divorce from her husband, a resident of New York, and subsequently remarried and returned to New York. Later the first husband sued for divorce in New York. *Held*, that this foreign divorce is invalid and no defence to the present suit. *Winston v. Winston*, 165 N. Y. 553; 59 N. E. Rep. 273. See NOTES, p. 66.

**CONSTITUTIONAL LAW — JURISDICTION — CONTROVERSY BETWEEN STATES.** — The State of Missouri sought to restrain the State of Illinois from operating a sewerage system to the detriment of the inhabitants of the plaintiff state. *Held*, that the State of Missouri is a proper party plaintiff, so as to give the United States Supreme Court original jurisdiction. *Missouri v. Illinois*, 21 Sup. Ct. Rep. 331. See NOTES, p. 67.

**CONTRACTS — EXCUSE — IMPOSSIBILITY.** — The defendants contracted to run cars on their electric road as often as once every half hour. A series of unusually severe snowstorms obliged them to suspend operations for a time. *Held*, that there was an implied condition relieving the defendants from liability when, without their fault, performance was rendered impossible. *Buffalo, etc., Co. v. Bellevue, etc., Co.*, 165 N. Y. 447; 59 N. E. Rep. 5. See NOTES, p. 63.

**CONTRACTS — MISTAKE OF LAW — UNCONSTITUTIONAL STATUTE.** — A contract with a city contained, in accordance with the requirements of a statute, a stipulation that, if the contractor should fail to pay his workmen the prevailing rate of wages in the locality, the contract should be void. He did not comply with the stipulation. *Held*, that, the statute being unconstitutional, he is entitled to the contract price. *People ex rel. Rodgers v. Coler*, 166 N. Y. 1; 59 N. E. Rep. 716.



Since it can hardly be denied that the parties, apart from statute, could make such a contract if they chose, it is difficult to see what difference it can make that they did it in obedience to a void statute. It cannot be said that a contract deliberately entered into lacks mutual consent simply because the parties supposed that they could not legally have made it on different terms. Even had it been shown that neither party would have allowed the stipulation to be inserted but for the belief that the statute was binding, this would have been at most an error of law, against which it is generally held that there is no relief in law or equity. 3 WILLISTON'S PARS. CONT. 353. Moreover, had it been a mistake of fact it could have been corrected only in equity, and even that would have been a doubtful question. *Stoddard v. Hart*, 23 N. Y. 556. It is to be noted that the supposed necessity of inserting the stipulation must have made all the bids higher. The decision is therefore incorrect, and seems to rest on no authority.

#### CONTRACTS—MORAL CONSIDERATION—PROMISE TO PERFORM VOID CONTRACT.

—The plaintiff was induced by the defendant's promise of indemnity against loss to become surety for the defendant's husband. The promise was void on account of the disability of coverture. *Held*, that a subsequent promise made after the disability was removed, was void for lack of consideration. *Holloway's Assignee v. Rudy*, 60 S. W. Rep. 650 (Ky.).

The doctrine that an antecedent moral obligation is sufficient consideration to render a promise binding, was a creation of Lord Mansfield's. Just what moral obligation would be sufficient was never defined by him. That he meant to carry the doctrine beyond the familiar cases of infancy, bankruptcy, and the Statute of Limitations, which he used by way of illustration, is clearly shown by two of his later decisions. *Atkins v. Hill*, Cowp. 284 (1775); *Hawkes v. Saunders*, Cowp. 289 (1775). Although this new principle of Lord Mansfield's was viewed with disfavor, yet that it did find a place in the law for some time seems clear from two decisions, where a promise to perform a preceding void contract was held to be binding. *Barnes v. Hadley*, 2 Taun. 184 (1809); *Lee v. Muggeridge*, 5 Taun. 36 (1813). The doctrine has received no countenance in England since its repudiation in *Eastwood v. Kenyon*, 11 A. & E. 438 (1840). In this country it is now generally discredited, and the principal case is in accord with the weight of authority. *Esall v. King*, 93 Ala. 470; *Austin v. Davis*, 128 Ind. 472. A contrary view, however, still finds some support. *Hemphill v. McClimans*, 24 Pa. St. 367; *Beniley v. Lamb*, 112 Pa. St. 480. By the Georgia Code a strong moral consideration is valid. Ga. Code (1895), § 3658.

CONTRACTS—SERVICES—DISCHARGE FOR CAUSE.—On a contract for one year's service at a yearly salary, the plaintiff was discharged for neglect of duty. *Held*, that he could recover on the contract the proportional amount of his salary, diminished by the amount of legal damage caused by his wrongful act. *Hildebrand v. American Fine-Art Co.*, 85 N. W. Rep. 268 (Wis.).

The plaintiff should not have recovered on the contract, because of his own breach; for in every contract of service a promise by the servant that he will perform his duty faithfully is implied. WOOD, MAS. & S. § 83. It is that breach which justifies the employer in refusing to go on with the contract. When the contract is divisible, the servant may recover wages for the work done, since the consideration for the promise to pay *pro rata* has been received. *Taylor v. Laird*, 1 H. & N. 266. Cf. LANG. SUM. CONT. 137, 166. When, however, there is but one promise to pay a fixed amount, that cannot be apportioned, and if the service has not been completed, there is an essential breach, and should be no recovery on the contract. *Turner v. Robinson*, 5 B. & Ad. 780. The nature of the plaintiff's right here seems to be quasi-contractual, and his recovery if any should be on a *quantum meruit*, but this is not generally allowed where the plaintiff's breach is wilful. 12 HARV. LAW REV. 284. The opposite view seems the better one. *Britton v. Turner*, 6 N. H. 481. The principal case reaches practically the same just result, but in allowing recovery on the contract, seems erroneous on principle, though supported by the weight of American authority in parallel cases. *Byrd v. Boyd*, 4 McCord, 246.

EQUITY—INTERPLEADER—TORT-FEASOR—IDENTITY OF CLAIM.—The plaintiff sued for the contract price of lumber sold and delivered to the defendant. One C claimed that the plaintiff had converted the lumber from him, and that he was entitled to receive the contract price from the defendant, who was allowed, under a statute, to pay the money into court and substitute C in his place as defendant. *Held*,

that this statutory interpleader is governed by the same rules as a bill of interpleader, that the original defendant could not have maintained such a bill, and that the plaintiff is therefore entitled to the money paid into court. *Coleman v. Chambers*, 29 So. Rep. 58 (Ala.). See NOTES, p. 61.

**EVIDENCE — BURDEN OF PROOF — FACTS PECULIARLY WITHIN THE KNOWLEDGE OF THE DEFENDANT.** — The plaintiff, while a passenger on the defendant's train, was injured by a red-hot cinder from the engine. *Held*, that when these facts are shown, the burden of proof on the question of negligence falls upon the defendant. *Texas, etc., R. R. Co. v. Jumper*, 60 S. W. Rep. 797 (Tex., Civ. App.).

If by burden of proof is meant the duty of establishing freedom from negligence upon all the evidence, the case is clearly wrong, since proof of the defendant's negligence is an essential part of the plaintiff's case. *Caldwell v. New Jersey, etc., Co.*, 47 N. Y. 282. But if, as is probable, the court means that the duty is cast upon the defendant of producing evidence, in the absence of which there is a presumption in the plaintiff's favor, the case is in accord with the weight of authority. *Spaulding v. Chicago, etc., Ry. Co.*, 30 Wis. 110. The underlying principle of these cases is well established, namely, that when facts are peculiarly within the knowledge of one of the parties, the duty of going forward with evidence in respect to such facts lies on that party. THAYER, PREL. TREAT. EV. 359; *King v. Burdett*, 4 B. & Ald. 140. The application to this class of cases seems sound. The plaintiff is practically without means of acquiring information as to the equipment of the company's engines, while the company is in possession of all the facts. There are however numerous decisions where the principle is not applied. *Pittsburg, etc., R. R. Co. v. Hixon*, 110 Ind. 225.

**EVIDENCE — COLLATERAL MATTER — COMPLICATION OF THE ISSUE.** — In an action by an abutting owner to recover for injuries to his property by the operation of a railroad, the plaintiff, in order to prove damage both by actual depreciation in value and by loss of the increase in value which would have occurred but for the presence of the railroad, offered expert testimony as to the general course of values in other property in the neighborhood. *Held*, that the evidence is admissible. *Levin v. New York, etc., Ry. Co.*, 165 N. Y. 572; 59 N. E. Rep. 261.

The case raises the question as to how far evidence of collateral or extrinsic matter is admissible in proof of the fact in issue. The general principle applicable to such cases is that if the evidence is remote or conjectural, or unnecessarily complicates the issue, it will be excluded though logically probative. The question is one of common sense merely, the test being whether the practical objection that the evidence confuses or prejudices the jury is of sufficient weight to offset its logical value. THAYER, PRELIM. TREAT. EV. 516-518. Thus in each case the decision lies largely within the sound discretion of the court, and opposite results may often be reached though the same rule of law is applied. *Paine v. Boston*, 4 Allen, 168; *Petition of Thompson*, 127 N. Y. 463. The method of proof adopted in the principal case, though somewhat objectionable as raising collateral issues, is simple, logical, and indeed often necessary. Upon another view of the case the evidence might have been admitted as a statement by an expert of the reasons for his opinion. *Barber v. Merriam*, 11 Allen, 322.

**EVIDENCE — CRIMINAL TRIAL — TESTIMONY AT FORMER TRIAL.** — *Held*, that the prisoner was not entitled to introduce testimony given at his former trial by a witness since deceased. *Montgomery v. Commonwealth*, 37 S. E. Rep. 841 (Va.).

This decision follows the *dictum* in *Finn v. Commonwealth*, 5 Rand. 708, that in criminal actions the testimony given at a former trial by a witness since deceased cannot be introduced. This seems to be law in but two other jurisdictions. *United States v. Sterland*, Fed. Cas. No. 16387 (1858); *Cline v. State*, 36 Tex. Cr. App. 320 (1896). The Texas case, in which the evidence was offered by the prosecution, was decided on the ground that the admission of such testimony violates the constitutional provision that the prisoner shall have the right to confront the witnesses against him. It is, however, generally held that this provision is only an affirmation of the common law right of the accused that all testimony shall be delivered in his presence in open court, and is subject to the same exceptions and limitations, imposed by the necessities of the case. *State v. McO'Brien*, 24 Mo. 402; 1 GREEN. EV., 16th ed., § 163 f. Moreover the constitutional provision, even under the Texas interpretation, does not seem to apply in terms to the case where the accused seeks to prove the testimony of witnesses in his favor, and even if it were applicable in terms, as it exists solely for the protection of the accused, it is difficult to see what right the prosecution would have to object to its waiver by him.

**EVIDENCE — DYING DECLARATIONS — INCORPORATION OF WRITTEN STATEMENT.** — The declarations of the deceased, made in her last sickness, but before she had given up hope, were reduced to writing. Later, after she had lost hope, she declared that the written statement was correct. *Held*, that the writing was properly admitted as her dying declaration. *Wilson v. Commonwealth*, 60 S. W. Rep. 400 (Ky.).

The admissibility of dying declarations was formerly supported on the theory that the circumstance of impending death is of as great solemnity as an oath. *Woodcock's Case*, 1 Leach, C. C. 500. But the lack of an oath is not the only objection to such testimony, since its admission is inconsistent with the defendant's rights of cross-examination and of being confronted by his accusers. *Marshall v. Chicago, etc., Ry. Co.*, 48 Ill. 475. In spite of these weighty objections, however, this exception to the hearsay rule is properly held to be justified by the obvious necessity of the case. *Railing v. Commonwealth*, 110 Pa. St. 100. The declarations may be either written or oral. *Rex v. Reason*, 1 Strange, 499. An oral repetition *in extremis* of a previous statement would therefore clearly be admissible, and the corroboration in the principal case may be regarded as practically a restatement and adoption of the former declaration. Under similar circumstances, the admission of the writing has been so justified. *State v. McEvoy*, 9 S. C. 208. This reasoning seems sound and amply sufficient to support the decision.

**EVIDENCE — RES GESTA — NUISANCE.** — The plaintiff filed a bill to enjoin the defendant from storing cheese on his premises adjoining those of the plaintiff. Testimony of the plaintiff's janitor that the plaintiff's tenants had left, and had alleged the smell of the cheese as the reason for their departure, was rejected, and the injunction was refused. The plaintiff excepted to this ruling *inter alia*. *Held*, without mentioning the question of evidence, that the exceptions must be overruled. *Smith v. Crawford*, 56 N. Y. App. Div. 136.

Since no special damages were alleged in the complaint the fact of the tenants' leaving could be important only when explained by what the tenants said, since otherwise it could afford no sufficient inference as to the existence of an offensive smell. Therefore it should not be admitted in evidence. *Lewis v. Smith*, 107 Mass. 334. On the other hand, what the tenants said to the janitor, being reported by him, is hearsay and by itself inadmissible. *Stapylton v. Clough*, 2 E. & B. 933. In order to admit a declaration otherwise incompetent, as part of the *res gesta*, that is, as being part of or explaining an act, the act must be admissible alone. *Wright v. Tatham*, 4 Bing. N. C. 489, 498. Here therefore the act cannot make the declarations competent evidence, and consequently the janitor's testimony was properly excluded. *Gresham Hotel Co. v. Manning*, 1 Ir. Rep. C. L. 125.

**EVIDENCE — TESTIMONY AT FORMER TRIAL — TEST OF ADMISSIBILITY.** — The plaintiff in a civil action sought to introduce the testimony of a witness in a former trial between the same parties on the same issue, the witness being out of the jurisdiction but alive. *Held*, that the evidence is not admissible. *Wabash R. R. Co. v. Miller*, 59 N. E. Rep. 485 (Ind.).

It is established that such testimony is admissible in civil cases where the witness is dead. *Wright v. Tatham*, 1 A. & E. 3; *Yale v. Comstock*, 112 Mass. 267. The principal case limits the doctrine strictly to cases of death. There is some authority for this view. *Le Baron v. Crombie*, 14 Mass. 233. It is slight however, and the tendency of recent authority is towards a liberal rule, including insanity, illness, absence through the opponent's procurement, disappearance, and absence from the jurisdiction; in short, any circumstances under which equity would allow a deposition to be taken for the purposes of a common law trial. 1 GREENL. EV., 16th ed., § 163 ff. There are many troublesome distinctions in the cases and varying degrees of strictness. *Berney v. Mitchell*, 34 N. J. Law, 337. But the weight of authority holds the testimony admissible where the witness is out of the jurisdiction. *Minneapolis Mill Co. v. Minneapolis, etc., R. R. Co.*, 51 Minn. 304. The case therefore seems contrary not only to the trend of modern cases, but to the majority of actual decisions on the precise point involved.

**INSURANCE — BENEFIT SOCIETIES — CHANGE OF BENEFICIARY.** — One A, being a member of a benefit society, had the certificate made out to his wife. Later he wrote to the secretary, complying with the requirements for taking out a new certificate, and asking that such certificate be made out to his mother. The rules of the society made no provision for change of beneficiary. Before the new certificate had been

issued A died. *Held*, that his mother is entitled to the benefit. *Fink v. Delaware, etc., Society*, 57 N. Y. App. Div. 507.

By the New York Code, and by the usual rule, a member of a benefit society may change his beneficiary without the consent of the latter. N. Y. R. S. (1896), vol. 2, p. 1671; *Beatty's Appeal*, 122 Pa. St. 428. Such a change is of course a novation to which an assent by the association is necessary. Ordinarily the laws of the association or the certificate contain provisions in which an express or implied assent is involved. In the principal case, however, there were no such provisions. Nevertheless, in view of the almost universal practice of such associations, it is fair to imply an assent, since it is a clear advantage to the member, and cannot hurt the society, which would naturally try to make itself as attractive as possible; and in practice such an assent is implied. *Masonic Ben. Ass'n v. Bunch*, 109 Mo. 560; *NIBLACK, ACCID. INS.* 412. Consequently the new beneficiary in the principal case is entitled, since, when no method of changing is provided, a letter mailed to the company directing payment to a new beneficiary completes the change. *Hirschel v. Clark*, 81 Iowa, 200.

**INSURANCE—STANDARD POLICY—PROOF OF LOSS.**—The Minnesota standard fire insurance policy stipulates that proof of loss shall be furnished forthwith, but does not expressly say that compliance is necessary to recovery, nor provide for forfeiture on non-compliance. *Held*, that the insured may recover on furnishing proof of loss at any time within the two years limit. *Mason v. St. Paul Ins. Co.*, 85 N. W. Rep. 13 (Minn.).

The most natural construction of such a stipulation is that compliance is a condition precedent to any recovery. *Baker v. German Ins. Co.*, 124 Ind. 490. A provision for forfeiture would compel the insured to furnish proof of a loss too trivial to make it worth while to collect the insurance. In the principal case, it is admitted that the stipulation makes a condition precedent, but it is held that the provision as to time may be disregarded. There is considerable authority for this view. *Steele v. German Ins. Co.*, 93 Mich. 81. The word "forthwith," however, has a recognized legal meaning, namely, within a reasonable time. *Scammon v. Germania Ins. Co.*, 101 Ill. 621. It is difficult on principle to justify a disregard of this part of the condition, while effect is given to the rest.

**INTERNATIONAL LAW—ACTION BROUGHT BY SOVEREIGN—CROSS-LIBEL.**—*Held*, that a cross-libel cannot be entertained in answer to a libel filed by the United States for injuries to a government vessel resulting from a collision. *Bowker v. U. S.*, 105 Fed. Rep. 398 (Dist. Ct., N. J.). See NOTES, p. 59.

**JUDGMENTS—RES JUDICATA—HABEAS CORPUS PROCEEDINGS.**—*Held*, that the dismissal of a writ of *habeas corpus* by the federal courts of one circuit does not render the question *res judicata* so as to preclude its re-examination by the courts of another circuit in subsequent *habeas corpus* proceedings instituted therein by the same petitioner. *Carter v. McClaghry*, 105 Fed. Rep. 614 (Circ. Ct., D. Kan.).

The decision that the doctrine of *res judicata* is not applicable to proceedings in *habeas corpus* is in accord with the overwhelming weight of authority. *In re Snell*, 31 Minn. 110. The cases offer no satisfactory explanation of this peculiarity, but the reason seems to be that at common law neither the prisoner in whose behalf the writ was issued nor the petitioner who acted solely for him, was a party to the subsequent proceedings. The issue as to the lawfulness of the detention was not between the prisoner or the petitioner and the keeper, but between the court and the keeper. See 14 HARV. LAW REV. 612. If the keeper satisfied the court, the prisoner was remanded and no appeal was allowed. HURD, HABEAS CORPUS, ch. xi. The petitioner might however set another court in motion, and as the new writ raised the issue between different parties, the doctrine of *res judicata* could not be invoked. Where, as in the federal courts and in many jurisdictions, the prisoner is by statute allowed an appeal and thus made a party to the proceedings, there seems to be no good reason why the doctrine of *res judicata* should not be applied. *Perry v. McLendon*, 62 Ga. 598.

**PERSONS—SUIT BY INFANT—DECREASED EARNING CAPACITY.**—An infant sued through his mother, as guardian, for personal injuries. The mother, a widow, was held to be entitled to his services. *Held*, that damages may be given for decreased earning capacity before as well as after majority. *Chesapeake & O. Ry. Co. v. Davis*, 60 S. W. Rep. 14 (Ky.).

There is an apparent analogy between this case and that of damage to the earning capacity of a married woman, for which, by the strict common law, an action lay by the

husband alone, but not by the husband and wife jointly. *Barnes v. Hurd*, 11 Mass. 59. The case of the infant is distinguishable, however, since it is admitted that the parent can emancipate the child, either generally, or for particular purposes, as by allowing him to receive for himself a part of his earnings. *Donegan v. Davis*, 66 Ala. 362. Accordingly there seems no difficulty, where the guardian is also the parent, in allowing him to elect to recover damages to the earning capacity of the child during minority for the benefit of the child rather than for himself. *Abeles v. Bransfield*, 19 Kan. 16. In such a case the parent cannot afterwards, as an individual, recover for loss of services. *Baker v. Flint, etc., Ry. Co.*, 91 Mich. 298. And where he has already recovered for loss of services the reasoning above does not apply, and the damages in question cannot be recovered in the suit brought as guardian. *Houston, etc., Ry. Co. v. Miller*, 51 Tex. 270. The decision is therefore sound and supported by authority.

**PROPERTY — CURTESY — NATURE OF THE ESTATE.** — A married woman, who had issue living, inherited an estate in fee before the modern married women's property acts. *Held*, that the husband took an immediate life estate in his own right. *Dawson v. Edwards*, 59 N. E. Rep. 590 (Ill.).

All the authorities agree that a husband gets an indefeasible interest in the lands of his wife when issue is born. During the wife's life he is called tenant by curtesy initiate. But as to the exact nature of this interest there is a conflict. On the one hand it is contended that the husband, after issue born, is seised of a life estate in his own right, and that the interest of the wife is a reversionary one expectant upon the life estate of her husband. *Foster v. Marshall*, 22 N. H. 491; *Shortall v. Hinckley*, 31 Ill. 219. On the other hand it is contended that the husband remains jointly seised with the wife during her life. *Melvin v. The Proprietors, etc.*, 16 Pick. 161. The question is one of some nicety, and the law seems to contain no analogy upon which a result can be reached, but the latter of the two views seems more in accord with the ancient conceptions of the common law, upon which the solution must depend. 2 POLL AND MAIT., HIST. ENG. LAW, 405-418.

**PROPERTY — LIENS — ASSIGNMENT.** — A livery stable keeper, having a lien on a horse for board, assigned the claim, together with the horse as security therefor, to the defendant. The owner of the horse brought replevin. *Held*, that a lien, being a purely personal right, is not assignable, and that the attempted assignment in the present case destroyed the lien and constitutes no defence. *Glascock v. Lemp*, 59 N. E. Rep. 342 (Ind.). See NOTES, p. 70.

**PROPERTY — PUBLIC PONDS — RIGHTS OF LITTORAL OWNERS.** — *Held*, that a littoral owner on a public pond may obtain an injunction to restrain the taking of ice, for the purpose of sale, in such quantities as to reduce the natural level. *Sanborn v. People's Ice Co.*, 84 N. W. Rep. 641 (Minn.). See NOTES, p. 68.

**PROPERTY — RECORDING ACTS — DEFECTIVE ACKNOWLEDGMENT.** — The defendant claimed title to land under a deed of trust from A, acknowledged before a notary, who, being attorney for the beneficiary, was disqualified by the law of the state. The plaintiff claimed as judgment creditor on a subsequent execution against A, in a jurisdiction where a creditor is in the position of a purchaser for value. *Held*, that, the certificate being valid on its face, the record was constructive notice to the plaintiff, and he cannot recover. *Southwestern Mfg. Co. v. Hughes*, 60 S. W. Rep. 684 (Tex., Civ. App.).

Most registration acts, including that of Texas, require deeds to be properly acknowledged as well as recorded. TEX. R. S. (1895), § 4640. An acknowledgment is void if taken by one in interest, *Hammers v. Dole*, 61 Ill. 307, and the rule is applied in Texas to an attorney for either party. *Sample v. Irwin*, 45 Tex. 567. The principal case qualifies that rule where the certificate is valid on its face. To what extent such a certificate shall be conclusive proof of the legality of the acknowledgment is not entirely certain, but the general tendency is to protect one who relies on the certificate. WEBB, RECORD TITLE, §§ 87-89; note, 1 Am. Dec. 81. In several states however, the certificate is by statute made *prima facie* evidence only. 1 HILL'S CODE (WASH.) § 1436. To preserve the reliability of the records, public policy certainly makes it important that a recorded instrument shall in general not be impeachable by extrinsic evidence, and the result here reached seems highly desirable. *Bank of Benson v. Hove*, 45 Minn. 40. Cf. *Hitz v. Jenks*, 123 U. S. 297.

**PROPERTY—WILLS—DEVISE OF A CORPSE.**—The testator left a will urging that the manner, time, and place of his burial should be according to the defendant's wishes and directions. The defendant was in possession claiming under the will, and the widow and daughter of the deceased brought suit to recover the body. *Held*, that one has no property in a dead body so that he can dispose of it by will, the custody and right of burial belonging, in the absence of statutory provision, to the next of kin. *Enos v. Snyder*, 63 Pac. Rep. 170 (Cal., Sup. Ct.). See NOTES, p. 64.

**SALES—CONTRACTS—STOCKS CARRIED ON MARGINS.**—Brokers carrying stocks on a margin for a customer, under a contract made in Massachusetts, were adjudicated bankrupts on a voluntary petition. *Held*, that the customer, without tendering the rest of the purchase money, can prove a claim for the value of the contract at the date of the petition. *In re Swift*, 105 Fed. Rep. 493 (Dist. Ct., Mass.).

By the prevailing view a broker is pledgee of stocks carried by him on a margin, the customer having legal title therein. JONES, PLEDGES, 495. This view is hardly consistent with the custom of brokers to hypothecate stocks thus held. *Lawrence v. Maxwell*, 53 N. Y. 19. The principal case adopts a theory simpler and nearer to business practices, that the broker owns the stocks absolutely, but is under a contractual obligation to deliver on tender of the balance of the price. *Weston v. Jordan*, 168 Mass. 401. Normally tender fixes the time for delivery, but if it becomes apparent that the stocks will not be delivered, as a tender would be nugatory, performance is immediately due. *Cort v. Ambergate, etc., Ry. Co.*, 17 Q. B. 127. This rule seems to cover the principal case, for as the filing of the petition showed that the brokers would not perform, liability on the contract instantly accrued. Apparently neither the doctrine of anticipatory breach, *Roehm v. Horst*, 178 U. S. 1, nor the question of the proof of contingent claims was involved.

**SURETYSHIP—GUARANTY—NECESSITY OF NOTICE.**—The defendant guaranteed the payment of rent by the plaintiff's tenant. The plaintiff gave the defendant no notice of the default till long after it occurred, and the defendant had been put in a worse position in consequence. *Held*, that the facts show no defence to an action on the guaranty. *Welch v. Walsh*, 59 N. E. Rep. 440 (Mass.). See NOTES, p. 65.

**SURETYSHIP—STATUTE OF FRAUDS—PROMISE TO PAY THE DEBT OF ANOTHER.**—The plaintiff made a sale of lumber to X, retaining a lien, and, X being unable to pay, refused to deliver the goods. Thereupon the defendant, who was president of a corporation holding an unrecorded chattel mortgage on the lumber from X, induced the plaintiff to deliver by guaranteeing payment. *Held*, that the promise need not be in writing, within the Statute of Frauds, as a promise to pay the debt of another. *Choate v. Hoogstraal*, 105 Fed. Rep. 713 (C. C. A., 7th Cir.).

In general, in both England and America, wherever the promisor bears the relation of guarantor to the debtor, the statute applies. BROWNE, ST. FR., 5th ed., § 193. But there is a class of cases in which the promisor, having an interest in the property which gave rise to the debt, desires to free his interest from the creditor's claim, where it is generally held that the statute does not apply. *Williams v. Leper*, 3 Burr. 1886; *Fish v. Thomas*, 5 Gray, 45. Strictly, even these cases come within the statute. The promisor however, having received a benefit from the creditor's reliance on his promise, should be liable in quasi-contract to the extent of the benefit received, by analogy to settled cases. *Miller v. Roberts*, 169 Mass. 134. Practically, this would in general reach the same result. But in the principal case the corporation, not the promisor, owned the mortgage, and therefore he was benefited only as one of the stockholders, and should be liable, if at all, only to the extent of his benefit. The case, however, is a not unnatural extension of the anomalous rule above referred to.

**TORTS—JOINT WRONGDOERS—INDEMNITY.**—An employee of the plaintiff railroad company recovered against it for injuries due to the dangerous condition of a car received in transit from the defendant railroad, which had negligently failed to inspect the car. The plaintiff had inspected it, but through negligence had failed to discover the defect. *Held*, that the plaintiff is not entitled to recover over against the other road. *Galveston, etc., Ry. Co. v. Nass*, 59 S. W. Rep. 870 (Tex., Sup. Ct.).

The rule that there is neither contribution nor indemnity between joint wrongdoers is said not to apply unless the parties knew or must be presumed to have known that they were acting wrongfully. *Adamson v. Jarvis*, 4 Bing. 66, 73. Neither can the decision go on the ground that the defendant company was not the cause of the injury to the

employee, for by the better view he could have recovered against that company. *Pennsylvania R. R. Co. v. Snyder*, 55 Oh. St. 342; *contra, Glynn v. Central R. R. Co.*, 175 Mass. 510. The decision however is quite correct, for the judgment recovered by the employee is to be regarded as damage caused to one wrongdoer by the contributing negligence of himself and another. Ordinarily any suit by one against the other would be barred by contributory negligence, but if one later than the other was in such a position that, by the exercise of due care, he could have discovered and avoided the danger, he, as between the two, must bear the whole loss. *Nashua, etc., Co. v. Worcester, etc., R. R.*, 62 N. H. 159. The present decision correctly throws the loss on the party ultimately liable. The cases in which there is a warranty should be distinguished. *Boston Woven Hose, etc., Co. v. Kendall*, 59 N. E. Rep. 657 (Mass.).

**TORTS — LEGAL CAUSE — PLAINTIFF'S ILLEGAL ACT.** — The plaintiff's launch was anchored in violation of a treasury regulation forbidding anchorage of vessels within 150 feet of any wharf. The defendant's lighter, in passing, picked up the anchor chain and drew the launch into collision. *Held*, that the plaintiff cannot recover. *Foley v. McKeever*, 56 N. Y. App. Div. 517.

If the decision rests on the theory that the plaintiff's own wrongful act was the proximate cause of his injury, it is obviously sound. Apparently however, the ground taken by the majority is that the plaintiff's violation of the law is conclusive against his right to recover, since "except for the chain the damage would not have occurred." Some authority for this proposition is to be found. *Bosworth v. Swansey*, 10 Met. 363; *Gregg v. Wyman*, 4 Cush. 322. But the weight of authority is contrary, and the proposition seems unsound in principle. *Norris v. Litchfield*, 35 N. H. 277; *Hamilton v. Goding*, 55 Me. 419. Penalties for the violation of statutes are fixed by the state, and courts have no power to increase them by losses of property caused solely by the tortious act of another. *Philadelphia, etc., R. R. Co. v. Philadelphia, etc., Tugboat Co.*, 23 How. 209. Nor can the independent public wrong of the plaintiff avail a defendant as an excuse for his own tort. Only where such wrong is a contributing cause and not merely a condition of the injury should the recovery be barred.

**TRUSTS — BANKS — COLLECTIONS.** — *Held*, that after the proceeds of a note deposited for collection have been received by the bank, they are held in trust for the depositor, who is a preferred creditor in case of bankruptcy. *State v. Bank of Commerce*, 85 N. W. Rep. 43 (Neb.).

The case follows a previous Nebraska decision. *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786. It is held that at the time of the deposit the parties intended the note to be held in trust, and that nothing has occurred subsequently sufficient to alter the trust relation. *Nurse v. Satterlee*, 81 Iowa, 491. But most of the cases cited in support of the doctrine rest on other circumstances, such as the bank's insolvency at the time of deposit. *Cragie v. Hadley*, 99 N. Y. 131. The prevalent rule is that the moment a solvent bank receives the proceeds, the relation of trust is changed to that of debtor and creditor. *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237. This rule, it is submitted, is more in accord with the general understanding of the business community, which expects the money collected to be treated like an ordinary deposit. *Murine, etc., Bank v. Fulton, etc., Bank*, 2 Wall. 252, 256. Since banks as a rule charge nothing for collecting, they cannot be expected to hold the proceeds separate, as trust funds. Reason and the weight of authority seem opposed to the decision in the principal case.

**TRUSTS — LIFE TENANT AND REMAINDERMAN — PREMIUM ON BONDS.** — *Held*, that where there is nothing in the surrounding circumstances to show a different intention on the part of the creator of a trust, it is the duty of a trustee, who has invested the trust fund in bonds purchased at a premium, to make such deductions from the income payable to the life beneficiary as will make the principal of the trust fund whole when the bonds mature. *New York, etc., Co. v. Baker*, 165 N. Y. 484; 59 N. E. Rep. 257.

The ideal trust investment is one that yields a fair rate of interest to the life beneficiary and secures the *corpus* intact to the remainderman. The investment of a trust fund in bonds purchased at a premium, and held until maturity, involves the loss of both the premium and the interest upon it. A court sanctioning such investments should apportion the loss fairly between the life beneficiary and the remainderman. Neither should have any advantage at the expense of the other. *Cf. Kinmouth v. Brigham*, 5 Allen, 270. In losing interest upon the amount paid as premium the life beneficiary bears his share of the loss, and the premium itself should come out of the

*corpus*. 34 ALB. L. J. 144; *Boyer v. Chauncey*, 12 Pa. Super. Ct. 526. The decision, in throwing the entire burden upon the life beneficiary, seems unjust. The doctrine of the case, however, appears to be law in Massachusetts. *New England Trust Co. v. Eaton*, 140 Mass. 532. Although the point seems never to have been raised, it is perhaps arguable that, except in the absence of other safe and remunerative investments, the purchase of bonds at a premium, with the intention of holding until maturity, is not a proper administration of the trust estate.

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## REVIEWS.

AN EPITOME OF PERSONAL PROPERTY LAW. By W. H. Hastings Kelke, M. A., London: Sweet and Maxwell, Limited. 1901. pp. xv, 144. Mr. Kelke has certainly succeeded in crowding an astonishing amount of law into a very limited space. His work has also the merits of accuracy, due regard for proportion, and clearness of statement. First in order are considered the different kinds of absolute and qualified ownership. Then there is a discussion of the more important kinds of choses in action known to the English law, — negotiable instruments, annuities, insurance policies, debentures, and partnership and company shares. Mr. Kelke sketches briefly the English common law and statutory rules which govern such kinds of property, and brings out clearly the essential attributes of each variety. After touching upon other and less important matters, the book closes with a survey of bankruptcy and administration. The American reader may at first glance think the book rather too much given up to English statutory changes; yet, as a rule, it is not difficult to separate from the whole text the more general common law principles. At any rate, as an admirably suggestive summary of the present state of the English law of personal property, the book ought to prove highly useful.

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AN EPITOME OF ROMAN LAW. By W. H. Hastings Kelke, M. A., London: Sweet and Maxwell, Limited. 1901. pp. vii, 268. This little book furnishes us in a very small space with all that is essential for a general understanding of Roman law. In the opening chapter the history of the law is briefly, and, it would appear, accurately, given. A long chapter is then devoted to Family Law, and another to the allied subject of Tutors and Curators. Of course, the larger portion of the book is taken up by the chapters on *Jus Rerum*, — Property Law, Succession Law, and Contract Law. Delictal obligations are then briefly considered. And the final chapter treats at considerable length the subject of Procedure. Excellent notes explain the technical terms and phrases used, and an appendix gives numerous references to standard authorities on particular topics in the law which would prove useful to students desiring a more extended investigation. It must be confessed that the book is not easy reading owing to its extreme conciseness. One may well question whether conciseness gained by such methods as the entire omission of articles and the systematic abbreviation of ordinary words is entirely without disadvantages. But the book is obviously intended to be used in preparing for examinations, and for this purpose it leaves



nothing to be desired. Its excellent arrangement serves admirably to bring out the law in its historical development, and, notwithstanding its brevity, its fulness of detail, aided by an adequate tabular analysis, will render it invaluable for a hasty review.

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**TRADE UNION LAW AND CASES.** By Herman Cohen and George Howell, F. S. S. London: Sweet and Maxwell, Limited. 1901. pp. xiii, 250. During the last thirty years the law of England as to trade unions and their members has been greatly changed by Acts of Parliament. Trade unions have become for many purposes legally recognized organizations with legal rights and subject to legal control, strikes are no longer illegal as "in restraint of trade," and the decision in *Allen v. Flood* has practically made the civil action for conspiracy of no effect as against trade unions. It is to enable the workingman readily to ascertain what the law on such matters now is that the present work has been written. The first and introductory chapter states briefly the history and effect of the seven more important Acts of Parliament as to trade unions. In the rest of the book is given the text of these acts, to which is appended copious annotation under the various sections. The work of the authors appears almost entirely in these annotations, which consist largely of quotations from the decisions of the courts. The collection of cases cited numbers over one hundred, and undertakes to be exhaustive. As the authors state, the book is not intended to be a legal treatise, but rather a working guide and manual for any one who has occasion to know and act on the present English law as to trade unions. For this purpose it would seem that the book must be of considerable value to the English trade unionist, but it is obvious that its field of practical utility must be confined to Great Britain.

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We have also received:—

**THE LAW AND PROCEDURE OF UNITED STATES COURTS.** By John W. Dwyer, LL. M. Ann Arbor: George Wahr. 1901. pp. xxi, 339. *Review will follow.*

**GENERAL DIGEST, AMERICAN AND ENGLISH.** Bi-monthly advance sheets, February, 1901. Rochester: Lawyer's Coöperative Publishing Co. 1901. pp. 770.



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## REQUIRED NUMBERS OF WITNESSES; A BRIEF HISTORY OF THE NUMERICAL SYS- TEM IN ENGLAND.

**I**T is well known that in the civil law of Continental Europe, the great rival of the English common law system, the process of proof rested fundamentally on a numerical system, according to which a single witness to a fact was in general not sufficient, specific numbers of witnesses were in certain cases required, and in some regions, and for some purposes, the weight to be given to each witness' testimony was measured and represented in numerical values, even by counting halves and quarters of a witness; and this system continued in force down to comparatively recent times. In the English common law system of jury trial, on the other hand, it was completely otherwise. At common law there was but a single instance, and that a borrowed one, of almost accidental and of entirely anomalous origin (the rule in perjury), in which a numerical rule existed; what little else there is to-day of that sort has come into our system either by express statutes (all but one dating since 1800), or by the filtration of civil law rules through the court of chancery, or by local judicial invention. The reason of this contrast, and of our successful resistance to the civil law rules, and the causes of our freedom from a principle of evidence now generally acknowledged to be unsound and deleterious, form a history worth examining.

I. *The Numerical System in general.*

(1) It has been doubted whether the Roman law in its prime (that is, before 300 A. D.) proceeded upon a numerical system in its treatment of witnesses. But it is clear that by the time of the Emperor Constantine, and also in the later codification of the Emperor Justinian, which served as a sufficient foundation for the Continental civil law, the Roman law had adopted the general rule that one witness alone was insufficient upon any point.<sup>1</sup> This rule naturally came to be adopted in the Continental civil law, founded directly on the Roman law;<sup>2</sup> and in particular it became a part of the canon or ecclesiastical law, which for much of its material was accustomed to draw upon the Roman law. The ecclesiastical law developed the numerical principle freely, and elaborated many specific rules as to the number of witnesses necessary in various situations; against a cardinal, for example, twelve or perhaps forty-four witnesses were required. It is enough to note that its general and fundamental rule was that a single witness was in no case sufficient.<sup>3</sup> In the Church's system, however, this rule received an additional sanction, over and above the mere precedent of Roman law, from the law of God as revealed in Holy Writ; for passages in the Bible, both in Old and New Testaments, were confidently appealed to as justifying and requiring this rule by Divine com-

<sup>1</sup> *Digesta*, xxii. 5, 12 (Ulpian: "Ubi numerus testium non adiicitur, etiam duo sufficient; pluralis enim elocutio duorum numero contenta est;") *Codex*, iv. 20, 4 (A. D. 283, "solam testationem prolatam, nec aliis legitimis adminiculis causa approbata, nullius esse momenti certum est;") *ib.* 9, § 1 (A. D. 334; "Simili modo sanximus ut unius testimonium nemo iudicum in quocunque causa facile pitiatur admitti. Et nunc manifeste sancimus ut unius omnino testis responsio non audiatur, etiamsi præclare curiae honore præfulgeat").

<sup>2</sup> This had no direct influence on our own law, and need not be further noticed. Its tenor in the 1700's may be seen in Pothier, ed. 1821, *Procédure Civile*, pt. 1, c. iii., and it persisted on the Continent into the 1800's.

<sup>3</sup> *Ante*, 1400, *Corp. Jur. Canon.*, *Decret. Greg.* lib. ii. tit. xx. de testibus, c. 23, ("licet quædam sint causæ, quæ plures quam duos exigant testes, nulla est tamen causa, quæ unius tantum testimonio, quamvis legitimo, rationabiliter terminetur;") see also, *ib.* c. 28, c. 4 (quoting the Bible); *Decret. pars* ii., *causa* iv., *quæ* ii. and iii., c. iv., § 26, reproducing Ulpian; 1713, Gibson, *Codex Jur. Eccl. Angl.* 1054, ("In the spiritual court, they admit no proof but by two witnesses at least; in the temporal court, one witness, in many cases, is judged sufficient;") 1726, Ayliffe, *Parergon*, 541, 544, ("Though regularly single witnesses make no proof according to the civil and canon law, nor yet so much as half proof by these laws," yet there are exceptions; in criminal causes, no exception is named except for a confession;) 1738, Oughton, *Ordo Iudiciorum*, tit. 83, p. 127 ("Jura dicunt, quod regulariter duo testes sufficient").

For the modern ecclesiastical law, as keeping up these rules, see Hinschius (1897), *System d. katholischen Kirchenrechts*, vi. p. 101, § 364.

mand;<sup>1</sup> and this sanction sufficed to give to the numerical system of the ecclesiastical law an overbearing momentum and a sacred orthodoxy which must be considered in order to appreciate the force against which in due time the common law judges had to struggle.

The truth was, however, that at this time of the Papal Decretals, and long after the end of the middle ages, the rule precisely accorded with the testimonial notions of the time. It was not, in its spirit, an invention of the ecclesiastical lawyers, nor yet a mere continuance of Roman precedent; it was a natural reflection of the fixed popular probative notions of the time, — notions which prevailed as well in the sturdy, self-centred island of England as on the Continent at large. The prevalence and meaning of this underlying notion must now be examined.

(2) Civilization, needless to say, almost began over again with the invasion and settlement of southern and western Europe by the Gothic hordes in the 400s and 500s. Primitive notions prevailed once more, and the slow process of development had to be repeated, — repeated for the law as well as for other departments of life. Much Roman law remained in the South, and a large body of it was received in a mass in Germany in the 1500s; but this affected chiefly specific rules; the popular and general instinctive legal notions had to grow once more out of primitive into advanced forms. Now one of the universal and marked primitive notions is that of the oath as a formal act, mechanically and *ipso facto* efficacious (like the ordeal and the trial by battle), and quantitative in its nature. This notion is merely one particular phase of the entire system of formalism inherent in the stage of intellectual development at which our Germanic ancestors were at that epoch. It is a matter of the whole spirit of the times, not of a particular or local belief; and since the history with which we are now concerned is that of the growth and change of a radical and epochal conception, not easy to reproduce in our modern imaginations, it may be worth while (for obtaining a starting point) to

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<sup>1</sup> Deut. 17, 6: ["The murderer shall be put to death;] but at the mouth of one witness [only] he shall not be put to death;" 19, 15: "For any iniquity . . . at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established;" Numb. 35, 30 (like Deut. 17, 6); Matt. 18, 16: ["If thy brother trespass against thee, and reject thy complaint,] then take with thee one or two more, that in the mouth of two or three witnesses every word may be established;" II. Cor. 13, 1 (similar); I. Tim. 5, 19; Hebr. 10, 28 (allusions to the foregoing ideas); John 8, 17: "It is also written in your law that the testimony of two men is true."

remind ourselves of its inherent and pervasive nature by the following passage of acute analysis from Professor Hensler's *Institutionen des deutschen Privatrechts*:<sup>1</sup>—

"From the side of spiritual and moral development, the legal life of every civilized people exhibits itself in a movement through three stages; these may be termed the divinational, the formal, and the intellectual stages. . . . The transition from one stage to the other does not occur abruptly and immediately; thus, for example, the judgments of God, in the form known to history, as well as the oath itself, are institutions which, in their deepest sense, belong to the first stage, but have been adopted in the second stage, that of legal formalism. . . . By 'legal formalism' I mean that condition of legal thought in which the sensibly perceivable is accepted as the only or at least the dominant element producing legal effects, and the inward circumstances of a spiritual sort—dispositions, volitions, purposes, and the like—are excluded or forced into the background. In this larger sense the term 'formalism' is ordinarily not taken; we are apt rather by that term to mean merely the notion that transactions which are to have legal significance must have a prescribed form, *i. e.* a certain mode of utterance or action which is alien to the speech or doing of ordinary life. This external aspect of 'formalism' is, however, only the half of that which I here include by that name; the other half is what may be called the inward formalism, and it consists in this, that the substantial effects, the intrinsic value of the incidents of legal life is estimated by (as it were) stencils fixed by law. Thus, for example, we contrast the formal and the rational theory of proof, and under the former we class the rule that for full proof a single witness does not suffice, but that two credible witnesses are necessary. Where lies the formalism here? This rule has nothing to do with 'form' in the narrow sense noted above; the real element of formalism in it is that (by reason of long experience with the untrustworthiness of witnesses) a rule of thumb has been made, which denies to the judge his free discretion in the estimation of testimony and lays down a fixed law, not trusting to the often deceptive valuation of each man's credibility, character, and the like, but finding its security in the external mark of numbers. And so, in general, we may properly use the term 'formalism' of the law to express that tendency which excludes from consideration inward qualities, motives, volitions, and the like, and founds legal rules on external phenomena. . . . The formalism of Germanic procedure lays the fullest stress on the parties' acts, and at the same time confines these to prescribed formalities. The summons is given by the one party to the other; the detailed steps of the proceeding, even to the judgment, are brought forth in formal manner by

<sup>1</sup> I. 45, 49, 52. This great thinker, in some respects surpassing Professor Brunner, in the value of his contributions to legal history, is now Chief Justice of the Swiss Court at Basel.

the demands of the parties; the judgment is itself primarily only a determination as to which party has the privilege of making proof, and the proof itself is effectuated either by the oath, the most formal method conceivable, and eventually by the *judicium dei*. One may thus perceive how hateful and obnoxious to the Germanic clansman were the innovations which the procedure of the royal courts introduced and sought also to bring into the popular courts, how unwillingly he suffered the mode of proof by inquisition [jury], and how he chose rather to avoid the royal court and obstinately to suffer the consequences of contumacy than to submit himself to a procedure in which the judge's discretion had free play in the valuation of proof."

The same formalistic conception of law in general and of proof in particular, with some further illustrative details, has also been plainly described by Professor Brunner, that greatest of Germanists; and the following passage of his may profitably be considered here: <sup>1</sup>—

["The domination of formalism and the narrow limits of judicial freedom of judgment were the marked features of Germanic procedure.] It was not to the Court, and with the object of persuading the Court, that proof was furnished, but to the opponent, and with regard to the persuasion or belief of the whole body. The general principle [of formalism] included the proof-procedure; here, too, was the judicial discretion replaced by the compulsion of form. Thus the proof was not submitted to the judge's valuation, but was prescribed once for all by rules which must be fulfilled before the proof tested by them could be regarded as efficacious. These rules consisted of forms, in which the proof-result must manifest itself or (so to speak) crystallize itself, while proof-material available informally or in other forms remains disregarded. . . . The formalism of the party's oath exhibits itself above all in the feature that the oath is 'staffed'; for the opponent of the swearer, holding in his hand a staff, pronounces to the latter the oath-formula, which contains the allegation presented for decision. The swearer is obliged to repeat word for word this 'staffed' formula, while touching the staff and calling upon God. A single error of word defaulted him. . . . [So also for proof by witnesses.] There was no questioning of them. The witnesses had to swear, word for word, to the allegation presented for decision. The probative force of the witnesses' doings lay exclusively in the oath-form of their utterance. Only by an error in this form (it would seem) could the witnesses be ineffective. . . . Apart from peculiarities of special tribal laws, the controversy was decided as soon as the witnesses had sworn their oath according to the necessary formalities. If the opponent of their party was unwilling to let it rest here, he had (by some customs) a single

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<sup>1</sup> Die Entstehung der Schwurgerichte, ed. 1872, 48, 53.

means of overthrowing the witnesses, . . . [namely,] a duel with the impeached witnesses settled the result of the controversy."

The oath, then, in the Germanic epoch is but a single product of the pervading formalistic conception of procedure and of proof. All through the Saxon and Norman times, the oath is a verbal formula, which, if successfully performed without immediate disaster, is conceded to be efficacious *per se* and irrespective of personal credit. It follows, too, since the performance of this act is in itself efficacious, that the multiple performance of it, if persons can be obtained who can achieve this, must multiply its probative value proportionately. This numerical conception is inherent in the general formalism of it. Thus, again, all through these times, the oath is for greater causes, by greater numbers, sworn sometimes six-handed, or twelve-handed, or twenty-four-handed; that is, a degree of greater certainty is thought to be attained, not by analyzing the significance of each oath in itself and relatively to the person, but by increasing the number of the oaths. An oath was one oath; and though as between persons of inferior and superior rank certain differences were sometimes recognized, yet in general and between persons of the same rank one oath was equal to any other oath, with no distinctions based on their testimonial equipment for the case in hand. In short, whatever varieties of probative situations present themselves, the only expedient that suggests itself seems to be some change in the number of oaths.<sup>1</sup> Little by little, to be sure, a newer idea develops. Numerous oaths may be required to overcome certain strong masses of (what we should now call) presumptive evidence. The classes of cases in which oaths are allowed operative force *per se* are diminished. Most important of all, witnesses may be examined briefly before being allowed to take the oath, and witnesses showing a total lack of knowledge may not be allowed to swear;<sup>2</sup> and of a piece with this comes the separate examination of witnesses swearing on the same side, for a conflict in their stories when separately examined resulted in discrediting their oaths; even in this latter expedient the feebleness of the new reasoning process is seen, in that the oaths appear (at any rate when taken before the judges and not before a jury) merely to fail as formal acts, and little attempt is

<sup>1</sup> The rules here summarily referred to may be found in Brunner, *ubi supra*, c. iii.; Thayer, Preliminary Treatise on Evidence, 17-34; Lea, Superstition and Force, 4th ed. 21-100.

<sup>2</sup> Yet even here the innovation made little direct change in the formal effectiveness of the oath: Brunner, *ubi supra*, 67, 68, 85, 198.



made to decide upon the witnesses' relative personal credit.<sup>1</sup> Finally the spread of jury trial must have helped gradually to develop the more rational spirit of investigation of facts and to outlaw the more marked features of primitive formalism. But these steps of progress in popular conceptions of the nature of proof are only slow and gradual, — much more so than one might suppose. The early superstitious and extreme notion of a witness' oath dies out, but the mechanical, quantitative, formal conception persists for many centuries. Its purely quantitative and ponderative nature, at a much later period, may be seen, for example, in the treatment of opposing witnesses' contradictions : —

*Thayer*, Preliminary Treatise on Evidence, 23 : "We read [in a case of *cui in vita*, in 1308,] that they were at issue *issint cesti qui miculx prove miculx av.* and the tenant proves by sixteen men, etc., and the demandant by twelve ; and because the tenant's proof '*fuit greindr* than the demandant's, it was awarded, etc.' If we take Fitzherbert's account to be accurate, it might appear that the twelve men on each side cancelled each other and left a total of four to the credit of the tenant, a result which left his proof the better."

It is surprising to us to-day to note how long this conception of the oath (*i. e.* of a single testimonial assertion) persisted. What is material to our purpose is that as a popular notion and instinctive mental attitude it was still in almost full force in the 1500s, at the time when the conflict of the common law and the ecclesiastical system came upon the stage. The vital force of this quantitative view of a witness' testimony is seen pressing to the surface in abundant casual instances down into the 1700's;<sup>2</sup> and it is only here and there that a protest is raised against its fallacy.<sup>3</sup> It

<sup>1</sup> See *Thayer*, *ubi supra*, 22, 98, 99; and an article on "Sequestration of Witnesses," 14 HARV. LAW REV. 475.

<sup>2</sup> 1571, Duke of Norfolk's Trial, *Jardine's Crim. Tr.* i. 178 (Richard Candish was sworn and testified to treasonable words of the accused, "when the Duke gave him reproachful words of discredit;" upon which Serjeant Barham interjected, "He is sworn, there needeth no more proving"); 1633, Massinger, in "A New Way to Pay Old Debts," act 5, sc. 1 (Sir Giles Overreach; "Besides, I know thou art a public notary, and such stand in law for a dozen witnesses"); 1683, L. C. J. Pemberton, in *Lord Russell's Trial*, 9 How. St. Tr. 577, 618 ("If you cannot contradict them by testimony, it will be taken to be a proof"); 1715, Parker, C. J., in *R. v. Muscot*, 10 Mod. 192 ("a credible and probable witness shall turn the scale in favor of either party"); 1736, Lord Hardwicke, C. J., in *R. v. Nunez*, Lee cas. T. Hardwicke, 266 ("One witness is not sufficient to convict a man of perjury, unless there were very strong circumstances; because one man's oath is as good as another's").

<sup>3</sup> See the remarks of Sir John Hawles, Solicitor-General (about 1700), in 8 How. St. Tr. 741.

is probable, indeed, that the long delay in abolishing the disqualification of witnesses by interest, and the popularity of those rules till the end of the 1700s was due to a lurking feeling that an "oath-assertion, merely as such, of anybody, no matter," who the person, was at least good for something,—counted one (let us say) as testimony. Only by a slow and comparatively recent development came the rational notion of analyzing and valuing testimony other than by numbers. Even to-day, among juries in some places, there is no doubt a mere counting of oaths or witnesses.<sup>1</sup> Impossible as it may be to note in any precise epoch the parting of the ways, and to put ourselves back fully into the mental condition of the former days, the living force of the old numerical conception as late as the 1500s and 1600s cannot be doubted. It appears plainly enough even on the dead printed pages of the State Trials; and its nature has been very well phrased by Sir James Stephen, in the following passage:—

*Stephen*, History of the Criminal Law, i. 400: "The opinion of the time [before 1700] seems to have been that, if a man came and swore to anything whatever, he ought to be believed, unless he was directly contradicted. . . . The juries seem to have thought (as they very often still think) that a direct unqualified oath by an eye- or ear-witness has, so to speak, a mechanical value, and must be believed unless it is distinctly contradicted. . . . If the Court regarded a man as a 'good' (*i. e.* a competent) 'witness,' the jury seem to have believed him as a matter of course, unless he was contradicted; though there are a few exceptions. . . . The most remarkable illustration of these remarks is to be found in the trial of the five Jesuits. . . . [Chief Justice Scroggs says:] 'Mr. Fenwick says to all this, "Here is nothing against us but talking and swearing." But, for that, he hath been told (if it were possible for him to learn) that all testimony is but talking and swearing; for all things, all men's lives and fortunes, are determined by an oath, and an oath is by talking, by kissing the book, and calling God to witness to the truth of what is said.' . . . Scroggs was right as to what it [the practice of juries] actually was, and to a certain extent still is. It is true that juries do attach extraordinary importance to the dead weight of an oath."

(3) There was, therefore (and this is at once the sum of the foregoing and the key to the ensuing history), in the English common law courts of the 1500s, nothing at all of repugnance to the numerical system already fully accepted in the ecclesiastical law. The same popular probative notion there prevailed among judges,

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<sup>1</sup> Compare the measures taken in the Code Napoléon to educate juries out of this attitude; as noted by Mr. Best, Evidence, § 70.

juries, and counsellors as on the Continent. They were equally prepared and accustomed to weigh testimonies by numbers, and therefore would see nothing fallacious in a rule declaring one witness not enough, and requiring specified numbers of witnesses. And this adoption was in fact frequently demanded of the common law courts. It was a time when the conflict between the ecclesiastical and the common law courts was at its last and perhaps most violent stage, — a conflict important in other respects to the rules of evidence.<sup>1</sup> The methods of the ecclesiastical courts were forming those of the court of chancery; the ecclesiastical lawyers were a distinguished and powerful body; their influence was notably felt in politics and in political trials; and there was no way of yet knowing whether their system and not the common law system might ultimately preponderate in the shaping of English jurisprudence. When their rule declaring one witness insufficient was appealed to, the appeal had behind it the force of presumption due to the prestige of a great system, orthodox on the Continent, and not unequal in its rivalry in England. Add to this, the immense force of an appeal to the law of God, to the Scriptures sanctioning the rule of the Church's law, and protecting the innocent against condemnation by single witnesses. Such was the attempt now repeatedly made to fix upon jury trials at common law the fundamental rule of the ecclesiastical law; and it is apparent, from the utterances recorded as late as the early 1600s, that there was no certainty that the attempt would not succeed:

1620, Lord *Bacon's* Trial, 2 How. St. Tr. 1087, 1093; Sir Edward Coke: "It is objected that we have but one single witness, therefore no sufficient proof. I answer, that in the 37th of Eliz., in a complaint against soldier-sellers, for that having warrant to take up soldiers for the wars if they pressed a rich man's son they would discharge him for money, there was no more than *singularis testis* in one matter; but though they were single witnesses in several matters, yet, agreeing in one and the same third person, it was held sufficient to prove a work of darkness. . . . In this [charge of bribery] one witness is sufficient; he that accuseth himself [*i. e.* the bribe-giver] by accusing another is more than three witnesses."

1623, *R. v. Newton*, Dyer 99 *b*, note; information against a grocer for cheating: "It was agreed by the two chief justices concerning the testimony of one, as follows: When two or three offences are proved by single witnesses, *sc.*, one witness to each offence, a single witness suf-

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<sup>1</sup> Compare the history of the rule against self-crimination.

fices if they be both offences of the same species and against the same party, otherwise not."

1632, *Sherfield's Trial*, 3 How. St. Tr. 519, 542, 545; L. C. J. Heath: "A judge is bound ever to give sentence *secundum probata*, not *probabilia*. That he [the defendant] undertook to satisfy the bishop, this I think is proved by [only] one single witness."

1637, Bishop of *Lincoln's Trial*, 3 How. St. Tr. 769, 786; Lord Cottington, L. C.: "It is not always necessary in this Court to have a truth proved by two or three witnesses; men will be wary in bribery; . . . and *singularis testis* many times shall move and induce me verily to believe an act done, when more proofs are shunned."

1640, Earl of *Strafford's Trial*, 3 How. St. Tr. 1427, 1445, 1450; the defendant argues, "to the Primate's testimony, . . . he is but one witness, and in law can prove nothing;" such "therefore could not make faith in matter of debt, much less in matter of life and death."<sup>1</sup>

The traditional practice of the common law courts, at the time of this attempt, is revealed definitely in the controversy over certain prohibitions issued by them forbidding the ecclesiastical courts to take cognizance of matters temporal (*i. e.* not matrimonial nor testamentary). It is not clear that the former specifically acted on the ground of the latter's employing an improper rule of evidence; they apparently disputed the jurisdiction, not the mode of proof. But it seems to be conceded by the ecclesiastics that the common law judges in practice asked for no more than one witness. These had as yet probably not had the issue forced upon them in their own courts; but their orthodox practice is clear; they never required a number of witnesses before the jury:

1605, *Bancroft's Articuli Cleri*, and the *Judges' Answers*, 2 Co. Inst. 599, 608; 2 How. St. Tr. 131, 143: "*Objection* [by the Clergy]: There is a new devised suggestion in the temporall Courts commonly received and allowed, whereby they may at their will and pleasure draw any cause whatsoever from the ecclesiasticall court; for example, many prohibitions have lately come forth upon this suggestion, that the laws ecclesiasticall do require two witnesses, where the common law accepteth of one, and [that] therefore it is *contra legem terrae* for the ecclesiasticall judge to insist upon two witnesses to prove his cause"; *Answer* [by the Judges]: "If the question be upon payment or setting out of tithes, or upon the proove of a legacy or marriage, or such like incidence [of strictly ecclesiastical jurisdiction], we are to leave it to the tryall of their law, though

<sup>1</sup> See, also, *Adams v. Canon*, (1622) Dyer 53 *b*; many other scattered instances might be found. The statutory rule for treason was said to have been enacted in direct imitation of the ecclesiastical law; see *post*, p. 101. The civil law rules actually obtained force in Scotland: 1705, *Green's Trial*, 14 How. St. Tr. 1199, 1235.

the party have but one witness; but where the matter is not determinable in the ecclesiastical court, there lyeth a prohibition, either upon or without such a surmise."<sup>1</sup>

It is about this time that the indications occur (in the passages already above quoted) of a judicial inclination to yield to the ecclesiastical principle, and of a general attempt to carry into the common law courts the fundamental rule that a single witness was not sufficient.

(4) But the attempt failed, and failed absolutely. After the middle of the 1600s there never was any doubt that the common law of England in jury trials rejected entirely the numerical system of counting witnesses and of requiring specific numbers.<sup>2</sup> The only exception to this — the case of perjury — "proves the rule," because it was not established until the early 1700s, when the rejection of the numerical system had been already definitively accomplished. Indeed, the reasons for this rejection had been already foreshadowed by Sir John Fortescue, in his treatise of the late 1400s; the problem and the conflict had not yet arisen practically in his time (the explanation of this will be noticed later); but when, in the late 1500s and the early 1600s, the issue was forced, this reason of his was as true as ever; and in spite of the indications of yielding (noted in the passages above) at times in the early 1600s, this reason, in the hands of the next generation of judges, was given full recognition and served to justify the common law system of evidence in its total repudiation of the numerical system.

<sup>1</sup> The following are instances of prohibitions arising in this controversy: 1607, *Chadron v. Harris*, Noy, 12 (plea, payment of legacy; prohibition not granted); 1611, *Roberts' Case*, Cro. Jac. 269 (mere surmise in advance, not sufficient to secure a prohibition); 1629, *Warner v. Barret*, Hetley, 87 (plea of *plene administravit*; prohibition apparently granted); 1688, *Richardson v. Disborow*, 1 Vent. 291 (legacy; prohibition issued); 1691, *Shotter v. Friend*, 3 Mod. 283 (payment of legacy; prohibition issuable); 1698, *Breedon v. Gill*, 1 Ld. Raym. 219, 221 (issuable for a legacy, but not for revocation of oral will).

<sup>2</sup> There is a foreshadowing of it in the previous century: 1551, *Reniger v. Fogossa*, Plowd. 1, 8, 12 (where the Court's opinion was for the defendant, without reasons given; but the defendant had argued that one witness sufficed in jury trials; Plowden published in 1578, and the case's significance dates from that time). But no positive deliverance seems to come till after the middle of the 1600s: 1662, *Tong's Trial*, 6 How. St. Tr. 226, Kelyng ("at common law, one witness is sufficient to a jury"); then Sir Matthew Hale and L. C. J. Holt, quoted *post*, emphasize this before the end of the century. Thereafter the matter is assumed on all hands: 1806, L. C. Erskine, in *Clifford v. Brooke*, 13 Ves. Jr. 131, 134 (the law of one witness's sufficiency "is uniform in principle and practice, with the single exception of the case of perjury").

(5) What, then, was the reason why the common law judges, in their system of evidence for jury trials, declined to number witnesses like the ecclesiastical court, and to lay down the rule that a single witness was insufficient? Briefly, the different nature of the tribunal. The situation which would call for such a rule simply did not exist for the common law judge. The case of having merely one witness could not arise; for the jurymen were already witnesses to themselves as well as triers. It is unnecessary here to do more than recall that vital circumstance which has in so many ways affected the history of our rules of evidence, namely, that the jury, until at least the early 1700s, were in legal theory entitled to avail themselves of information contributed personally by themselves and obtained independently of the witnesses produced in court; and that during the 1500s and 1600s this joint quality of witnesses and jurors still obtained practically for a more or less considerable part of their evidential material.<sup>1</sup> The situation was, therefore, radically different for the common law judge and the ecclesiastical judge. The former need not and could not measure the witnesses that appeared before him. He could not declare one insufficient and two or more necessary, for this was not all the evidence. There was always, besides the witnesses produced in court, an indefinite and supplementary quantity of evidence existing in the breasts of the jurors. There were (as Fortescue says) twelve other witnesses besides the one produced before the bar; and, as to the extent of the evidential contribution of these others, the judge did not know and had no right to know what it amounted to. It was therefore impossible and preposterous for him to attempt to declare insufficient and to reject the one or more witnesses produced in court. The jury might still go out and find a verdict upon no witnesses (of the ordinary kind) at all. Judicial rules of number would thus be wholly vain and out of place. Such was the logical and necessary answer to any attempt to introduce the numerical system in jury trials. This had been Fortescue's reasoning in the 1400s; and this was the answer of the judges in the late 1600s, when the question was forced upon them:—

*Circa 1460, Sir John Fortescue, L. C., in his De Laudibus Legum Angliae, c. 33: "Prince: 'But, my good chancellor, though the method [of trial by jury] whereby the laws of England sift out the truth in mat-*

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<sup>1</sup> The demonstration of this has been made in Thayer's *Preliminary Treatise on Evidence*, 137-170.

ters which are at issue highly pleases me ; yet there rests one doubt with me, whether it be not repugnant to Scripture. Our Blessed Saviour says to the Pharisees, " It is written in your law that the testimony of two men is true ;" and, in confirmation, he subjoins in the very next verse, " I am one that bear witness of myself, and the Father that sent me beareth witness of me." The Pharisees were Jews, wherefore it is the same thing to say, " It is written in your law," as to say, " It is written in the law of Moses," which was no other than the law of God given by Moses to the children of Israel ; wherefore, to contradict this law of Moses is in effect the same as to contradict the law of God ; from whence it follows that the law of England deviates from this law of God, which it does not seem lawful in anywise to impugn. It is written also that our Saviour, speaking of offences and forgiving one another, among other things delivers himself thus : " If thy brother will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." Now if in the mouth of two or three witnesses God will establish every word, why do we look for the truth in dubious cases from the evidence of more than two or three witnesses ? No one can lay better or other foundation than our Lord hath laid. This is what in some measure makes me hesitate concerning the proceedings according to the laws of England in matters of proof ; wherefore I desire your answer to this objection.'

" *Chancellor* : ' The laws of England, sir, do not contradict these passages of Scripture for which you seem to be so concerned ; though they pursue a method somewhat different in coming at and discovering the truth. . . . If the testimony of two be true, *a fortiori* the testimony of twelve ought rather to be presumed to be so. The rule of law says " the more always contains in it that which is less." . . . The meaning of the [Jewish and civil] law is this, that a *less* number than two witnesses shall not be admitted as sufficient to decide the truth in doubtful cases ; . . . and that the truth in some cases may be proved by two witnesses only, when there is no other way of discovering it, is what the laws of England likewise affirm.<sup>1</sup> . . . Wherefore the law of England does not call in question any other law which finds out the truth by witnesses, especially when the necessity of the case so requires ; the laws of England observe a like method, not only in the cases already put, but in some others which it is not material now to enlarge upon. But it never decides a cause *only* by witnesses, when it can be decided by a jury of twelve men, the best and most effectual method for the trial of the truth, and in which respect no other laws can compare with it.' . . .

" *Prince* : ' I am convinced that the laws of England eminently excel, beyond the laws of all other countries, in the case you have been now

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<sup>1</sup> Here he names the instances of " trial " by witnesses without jury, in admiralty, etc.

endeavoring to explain. And yet I have heard that some of my ancestors, kings of England, have been so far from being pleased with those laws that they have been industrious to introduce and make the civil laws a part of the constitution, in prejudice of the common law. This makes me wonder what they could intend or be at by such behaviour.'"

1551, *Brook, arguendo*, in *Reniger v. Fogossa*, Plowd. 1, 12 (denying that any number are required): "Witnesses are not necessary but where the matter is to be tried by witnesses only. For if witnesses were so necessary, then it would follow that the jurors could not give a verdict contrary to the witnesses, whereas the law is quite otherwise;" *Atkins, arguendo*: "I may put the matter to the inquest without any witness, and their knowledge shall aid me, and not the knowledge of the witnesses; for they may give a verdict contrary to the witnesses; and so the witnesses and their testimony is not very material when there is an inquest."

*Ante* 1680, Sir Matthew Hale, L. C. J., in his *History of the Common Law*, ch. 12: "Indeed, it is one of the excellencies of this trial [by jury], above the trial by witnesses, that altho' the jury ought to give a great regard to witnesses and their testimony, yet they are not always bound to, . . . and may and do often pronounce their verdict upon one single testimony, which thing the civil law admits not of. . . . As I before said, they are not precisely bound to the rules of the civil law, viz. to have two witnesses to prove every fact (unless it be in cases of treason), nor to reject one witness because he is single, or always to believe two witnesses if the probability of the fact does upon other circumstances reasonably encounter them; for the trial is not here simply by witnesses but by jury."

1696, *Vaughan's Trial*, 13 How. St. Tr. 485, 535, treason upon the high seas; it was argued that the admiralty trial under the civil law was the proper one; L. C. J. *Holt*: "There needs not two witnesses to prove him a subject [of the King]; . . . I must tell you, as [to] the doctrine of the civil law, it is not universally received in all countries; it is received in several countries as they find it convenient, and not as obligatory in itself;" Dr. *Oldish*: "Yes, in all places, as to proof; for it is the law of God and nations, 'ex ore duorum vel trium,' etc., and one witness is no witness;" L. C. J. *Holt*: "Our trials by juries are of such consideration in our law that we allow their determination to be best and most advantageous to the subject; and therefore less evidence is required than by the civil law. So said Fortescue in his commendation of the laws of England." Dr. *Oldish*: "Because the jury are witnesses in reality, according to the laws of England, being presumed to be 'ex vicineto;' but when it is on the high and open seas, they are not then presumed to be 'ex vicineto,' and so must be instructed according to the rules of the civil law by witnesses;" Baron *Powis*: "This is not a trial by the civil law."<sup>1</sup>

<sup>1</sup> Apparently the statute under which this trial was had, substituting the jury trial



That this was the actual and only reason for rejecting the numerical system is further to be seen in the circumstance that wherever the common law *had* preserved a "trial by witnesses," *i. e.* a determination by oaths made directly before the Court without the intervention of a jury, there the numerical system was found in force, — not in an elaborate form, but in its fundamental notion that one witness alone was not sufficient. "The laws of England," says Sir John Fortescue, "likewise affirm," with the civil law, "that a less number than two witnesses shall not be admitted as sufficient" in cases where a jury is not used. This was, indeed, the accepted tradition for "trial by witnesses" made directly to the Court in the manner of the civil and ecclesiastical law. There has been some difference of opinion as to the kinds of issue in which this was the proper mode of trial;<sup>1</sup> but there seems to be no doubt that whenever it was the proper mode, the witnesses must be at least two in number.<sup>2</sup> Moreover, when the classical commentators refer to the rule for this mode of trial, they expressly point out as the reason for the distinction the fact that the jurors are themselves also witnesses.<sup>3</sup> This reason, then, — the different nature of the jury as a tribunal, — was the reason for the failure of the numerical system to find a place in our common law rules of evidence.

(6) It remains only to ask why this question did not come up for practical settlement earlier than the 1600s? Why was not the contrast between the ecclesiastical system and the common law system forced to an issue before that comparatively late period in the history of jury trial? The jury had been in general use for at least three hundred years, and the ecclesiastical courts had had an

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for trial by the civil law, was passed chiefly for the very purpose of avoiding the latter's numerical rules; see the preamble to St. 27 H. VIII. c. 4 (1535); St. 28 id. c. 15; Hawkins, Pl. Cr., b. I., c. 37, § 3; c. 31, § 12.

<sup>1</sup> See Thayer, Preliminary Treatise on Evidence, 17-24; Best, Evidence, §§ 612-614.

<sup>2</sup> *Ante* 1726, Gilbert, Evidence, 151 (stating as an exception the case of a bastard's mother charging the father); Best, *ubi supra*.

<sup>3</sup> 1629, Coke upon Littleton, 6 b ("It is to be knowne that when a trial is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove a summons of the tenant, or the challenge of a juror, and the like. But when the trial is by verdict of twelve men, there the judgment is not given upon witnesses or other kinde of evidence, but upon the verdict, and upon such evidence as is given to the jury they give their verdict"); 1726, Gilbert, Evidence, 151 ("for one man's affirming is but equal to another's denying, and where there is no jury to discern of the credibility of the witnesses, there can be no distinction made; . . . that must be left to the determination of the neighborhood").

even longer career in England. Why had not the attempt been earlier made to introduce the witness-rules of the latter into the procedure of the former? The answer is, simply, that there had before then been no witnesses to whom the ecclesiastical rules could be claimed to apply. It is perfectly well established that the extensive and habitual use of witnesses, in the modern sense, does not appear until the 1500s;<sup>1</sup> and it may be supposed that all through the 1500s the increase of importance in the witnesses' function, and the relative quantity of the information supplied by them as compared with that supplied by the jurors' own knowledge, was but of slow and gradual growth. In the previous history of the jury, and until this period of 1500-1650, there would be no suggestion of an analogy to the situation in the civil law courts; or, if the suggestion were made (as by Fortescue in the 1400s), it would be answered that there *were* in the jurors themselves more than the needed number of witnesses. But as the function of the jurors became more sensibly and markedly that of mere triers, or judges of fact, proceeding chiefly upon the evidence of witnesses in the modern sense, the analogy of the situation to that of the ordinary civil law judge would be fully perceived, and the propriety of applying the numerical system to the testimony upon which the jury now chiefly depended could fairly be claimed. This situation did not sensibly exist before the 1600s; and it was therefore not until that century that the question came to be pressed for practical solution.

In the matter of time, one more interesting consideration remains to note. If the change of the earlier conditions of jury trial had come about more rapidly, if before the 1500s the jurors had ceased to be also witnesses, and had come to decide chiefly upon the testimony of produced witnesses, the numerical system might after all have been grafted into our body of evidence-rules. The jury would then have been mere judges of fact, obliged to depend upon others' testimony and to weigh accurately its worth, while the popular quantitative conception of testimony would still have been in full force; there would thus have been every reason to expect the enforcement for juries of the general notions of testimony which were still in vogue among the common law judges and the people at large. This is, to be sure, only one of those contingencies which can easily be reconstructed in imagination;<sup>2</sup> but it

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<sup>1</sup> This is fully expounded by the jury's historian, in Thayer, *Preliminary Treatise*, 122-132.

<sup>2</sup> That this possibility, however imaginary, is by no means fanciful, may be seen

illustrates at any rate the radical extent to which our common law rules of evidence have been fundamentally affected by the nature of the jury tribunal and by the condition in which its steps of historical progress happened to place it at a given period.

There did come into our law, however, sooner or later, a few specific rules of the numerical sort, all of them being of the simple type that declares a single witness insufficient and requires additionally either a second witness or corroborating circumstances. Some of these — namely, the Chancery rule requiring two witnesses to overcome a denial on oath, the rule requiring two witnesses to a will of personalty, and the rule requiring two witnesses to a cause for divorce — existed only in the practice of the ecclesiastical courts or that of Chancery founded upon it; and wherever they came over into American common law courts, they were direct borrowings. Others, namely, the rule requiring an accomplice or a complainant in rape, or the like, to be corroborated, are either express statutory inventions or plain judicial creations; in either case modern innovations as well as local in the United States, and not a part of the inherited common law. There remain two specific rules — the rule in treason and the rule in perjury — which do come down to us as inheritances; and though these also are in strictness not common law rules, the one being statutory in ori-

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from Professor Brunner's account of the fate that did befall in France, when one of the forms of jury trial — the *enquôte par turbe*, consisting of ten men — came, in the course of its history, into competition with the ecclesiastical system; Schwurgerichte, ed. 1872, p. 393: "The *enquôte par turbe* occupied a wholly exceptional position in relation to the principles which dominated French proof methods after the 1300's. The contrast between them lay in this, that in other cases [than trial by *enquôte*] two witnesses sufficed to prove a fact [to the judge]. These two, however, were examined individually, while the *turbe* gave their verdict with a single utterance. . . . A way was therefore sought to bring this institution, now become alien, into harmony with the prevailing doctrine of proof. The *turbe* was now treated, for purposes of procedure, as a single person, and the verdict of the *turbe* was considered as equivalent to the assertion of a single witness. But since proof by witnesses, according to the well-known ecclesiastical rule, required at least two concurrent witnesses, it was prescribed, in 1498, by the Ordinance of Blois, art. 13, that for proving a custom [the chief issue for which the *turbe* was used], two agreeing verdicts of *turbes* should be necessary. . . . Whereas formerly the saying ran, 'a *turbe* is equivalent to two witnesses,' henceforward it went, 'A *turbe* is equivalent to but one witness.' Each *turbe* consulted by itself and gave a separate verdict; to effect proof, both *turbes* must agree. . . . After this change, the *enquôte par turbes* survived some two centuries, though preserving only slight practical importance. . . . By tit. 13, art. 1, of the Civil Ordinance of 1667, the *enquôte par turbes* was abolished; and thus disappeared from French legal life the proof method in which had been longest preserved the form of French *enquôte* nearest related to the jury."

gin, and the other an indirect borrowing from the ecclesiastical law, yet their roots go some distance back in our law, and their history can best be understood in the light of the general survey just made of the history of the numerical system. The growth of these two rules we may now examine.

## II. *The Treason Rule.*

It is clear enough that the rule requiring two witnesses to prove a charge of treason was not a common law rule, but had its beginning in the statutes of the 1500s.<sup>1</sup> Sir Edward Coke at one time ventured to advance the contrary assertion,<sup>2</sup> but his pretended authorities do not bear him out, and his utterances on this point appear by the circumstances to be of not the slightest weight.<sup>3</sup> There was no instance, before the 1600s, of a rule that the testimony of a single witness called before a jury at common law should be insufficient, as the history already examined amply indicates.

The rule begins, then, with the statutes of the 1500s; and the chief interest of its history lies in the controversy over the supposed repeal of the first statute, and in the true apportionment between the political parties of the blame of maintaining this repeal.

(1) The first statutory provision was that of Edward VI (1547 and 1552), by which two witnesses were declared necessary:—

1547, St. 1 Edw. VI, c. 12, § 22; no person is to be indicted or ar-

<sup>1</sup> 1762, Foster, Crown Law, 233 ("It hath been generally agreed, and I think upon just grounds (though Lord Coke hath advanced a contrary doctrine), that at common law one witness was sufficient in the case of treason as well as in every other capital case").

<sup>2</sup> 1629, Coke, 3 Inst. 26 ("It seemeth by the ancient common law one accuser or witnesse was not sufficient to convict any person of high treason; . . . and that two witnesses be required appeareth by our books, and I remember no authority in our books to the contrary").

<sup>3</sup> Coke's vacillation in legal tenets, when the interests of partisanship pressed, has often been noted upon other points (see an instance in 5 HARV. LAW REV. 73), and the present is merely another instance of his untrustworthiness. In 1603, in Raleigh's Trial (2 How. St. Tr. 15, 16), Coke as the King's Attorney-General, and on his way to be Chief Justice, had maintained that two witnesses in treason were unnecessary; his violent insistence upon Cobham's testimony, during his colloquy with Raleigh, supplied the most notorious instance, in all our annals, of unbridled forensic brutality and coarseness. But some years later, in 1629, when Coke had fallen from the favor of his royal master and was in opposition as a champion of popular liberties, he printed his Third Institute, and inserted in it a directly contrary assertion (above quoted); making no allusion to his own former doctrine nor to the repeated judicial decisions since 1555, and citing palpably irrelevant passages in support of his novel proposition. His authority on the present point is worthless.

aigned for treason, petty treason, or misprision, "unless the same offender or offenders be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same."

1552, St. 5 & 6 Edw. VI, c. 11, § 12; no person is to be indicted or arraigned for treason, "unless the same offender or offenders be thereof accused by two lawful accusers, which said accusers at the time of the arraignment of the party so accused, if they be then living, shall be brought in person before the party so accused and avow and maintain what they have to say against the said party . . . unless the said party arraigned shall willingly without violence confess the same."

The immediate circumstances leading to this step were probably the extreme methods used in some of the political trials with which the reign of Henry VIII. had just closed.<sup>1</sup> The law of treason had been by this monarch, as never before, wrested to his own personal and despotic ends; and (as Sir James Stephen has acutely remarked in another connection<sup>2</sup>) the dominant legislator class, who might not have cared how many a humble subject was unfairly convicted of petty thievery, were well alive to the possibilities of treason law if the rapid turn of the political wheel should chance to bring them underneath, and they probably were moved by the thought of self-protection against the future. As an expedient for this purpose, it was natural that they should seek aid in a rule of numbers. The numerical conception of testimony was then still an instinctive one among all; the ecclesiastical rules of that sort lay plainly in sight, in the spiritual practice; and a rule of numbers was perhaps not only the natural, but to them the only conceivable expedient for providing this protection. That this was in fact the source of the rule was at any rate the tradition as handed down a century later:—

1680, Lord *Stafford's Case*, T. Raym. 408: "Upon this occasion my lord chancellor in the Lords' House was pleased to communicate a notion concerning the reason of two witnesses in treason, which [reason] he said was not very familiar, he believed, and it was this: Anciently, all or most of the judges were churchmen or ecclesiastical persons, and by the canon law now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses, . . . and

<sup>1</sup> Professor Willis-Bund (*State Trials for Treason*, 1879, vol. i. Introd. xxxix.) thinks that this statute "was probably the result of such cases as the Marquis of Exeter's and the Earl of Surrey's." For another explanation, not essentially different, see Rastell's Statutes, 102, as quoted in 1 How. St. Tr. 520, and Bishop Burnet, arguing in the House of Lords, in 13 How. St. Tr. 537, 752.

<sup>2</sup> *History of the Criminal Law*, i. 226.

anciently heresy was treason; and from thence the parliament thought fit to appoint that two witnesses ought to be for proof of high treason."

(2) But the reactionary times of Mary's reign arrived shortly; and the following statute, the foundation of two hundred years' controversy, was immediately passed:—

1554. St. 1 & 2 P. & M. c. 10, § 7; all trials for treason hereafter had "shall be had and used only according to the due order and course of the common laws of this realm and not otherwise."

What was the effect of this statute? It did not expressly repeal the statutes of Edward; but if the due order and course of trials included the modes of proof at a trial, then the new rule of proof introduced by the former statute now fell away, and the common law practice, which made no requirement of number, was restored. Such was the judicial construction now put upon the new act. Whether it was the correct one need not here be considered in detail. Arguments of various sorts have been advanced;<sup>1</sup> the most significant one to the contrary, perhaps, is that the very next statute, chapter 11, in the same session,<sup>2</sup> expressly restored the old evidence-rules (of one witness) for petty treason committed by forging the coin of the realm, and that the legislature would have used similar express words in chapter 10, had they intended the same thing.

On the whole, it may be supposed that the legislature did intend in chapter 10 to strike hard at treason, and to annul the recent innovation by which two witnesses were required. But the important thing is that this was the judicial construction of the statute of Mary from the very first, — beginning within a year after its enactment and continuing for a hundred years.<sup>3</sup> This was afterwards

<sup>1</sup> The arguments may be found in the following places: 1716, Hawkins, Pl. Cr. ii. c. 46, § 2; 1762, Foster, Crown Law, 237 (arguing forcibly for the view that there was no repeal); 1803, East, Pleas of the Crown, i. 128.

<sup>2</sup> 1554, St. 1 & 2 P. & M. c. 11, § 3 (all trials for offences connected with the coin of the realm may be tried "by such like evidence and in such manner and form as has been used and accustomed within the realm at any time before the first year of Edward the Sixth"); c. 10, § 12 (similar); 1697, St. 8 & 9 W. III. c. 26, § 7 (similar); these were applied, as needing only one witness, in the following cases: 1725, R. v. Anstruther, T. Jones 233 (impairing the coin); 1748, R. v. Gahagan, 1 Leach Cr. L., 4th ed. 42 (similar).

<sup>3</sup> 1555, Anon., Dyer, 132 a ("The intent of the Statute 1 & 2 P. & M. c. 10, was to remove the two accusers and two witnesses;" approved by the judges; perhaps the same case as the following): 1556, Anon., Brooke's Abridgment, "Corone," 219 (at a conference of all the justices, it was agreed that "for no treason under St. 25 Edw. III. was there need of accusers at the trial, because it is enacted by the statute of 2 M. c. 10, that all trials for treason shall be held according to the common law only and not

forgotten, during the political ascendancy of the Whigs, after the Revolution of 1688 and during the early 1700s, when every reminiscence of the Stuarts was a dark one and all the doings of their times were anathematized. The trials of Sir Walter Raleigh in 1603, and of other noted victims of that time, were after the Revolution regarded by many as instances of unfair and corrupt political oppression by James the Second's judges. But time has vindicated the judges from such charges.<sup>1</sup> Whatever they were or did, they were not in this respect either unscrupulous or corrupt, and they did not distort the law for the pleasure of James. They merely applied, as in duty bound, the traditional and long-established construction of the statute of Mary, — a construction plainly laid down by the entire body of justices from the earliest moment after its enactment. Moreover, this construction was not even a mark of the Tudor and Stuart régimes as a whole. It continued under the Commonwealth, in the very heat of the passion of overthrow and reform. In the mean while a single statute requiring two witnesses for a specific kind of treason had been passed under a Tudor monarch;<sup>2</sup> but during the whole of the century, from 1554 to 1659, under Tudor, Stuart, and Cromwell alike, the construction of the statute of Mary was uniform. The unjust judgment of the dominant party of the Revolution was merely a political dogma.

(3) Before the end of the first half of the 1600s, however, had come Coke's Third Institute, in which he now advanced the view that the statute of Mary had *not* repealed the statutes of Edward.<sup>3</sup>

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otherwise, and the common trial of the common law is by jury and by witnesses, and by no accusers;" otherwise for treason charged under the same act of 2 M., "according to an article contained in the said statute at the end thereof"); 1586, Abington's Trial, 1 How. St. Tr. 1141, 1148; 1651, Love's Trial, 5 id. 43. A number of additional cases reaching the same result, but bearing only on the history of the hearsay rule, need not here be cited; the same statute of Edward had provided for confronting the accused with the two witnesses, and thus its repeal came into question also in that connection. So also in the history of confession law the same construction is found, the authorities are considered in an article by the present writer on "Confessions," 33 Amer. Law Rev. 378.

<sup>1</sup> Professor Willis-Bund, in his *State Trials for Treason*, cited *supra*, has demonstrated this for procedure in general and the substantive law of treason.

<sup>2</sup> 1558, St. 1 Eliz. c. 1, § 37 (no person to be arraigned for treason under this act, "unless there be two sufficient witnesses" produced if living and in the realm). The St. 13 Eliz. c. 1, has sometimes been said to make a similar provision; but this is a misunderstanding of it.

<sup>3</sup> 1629, Coke, 3 Inst. 26 ("for that act of 1 & 2 P. & M. extends only to trials by the verdict of twelve men *de vicineto* . . . and the evidence of witnesses to the jury is no part of the trial, for by law the trial in that case is not by witnesses, but by the

His reasoning is apparently that the word "trial" in the statute meant merely the mode of decision, *i. e.* by a jury, as contrasted with a decision by judges hearing witnesses without a jury; to be sure, the word "trial" bore then that distinction,<sup>1</sup> but it is a forced meaning to put upon it in the statute, since nobody had ever thought of "trying" treason by witnesses to a judge without a jury (which is what the "otherwise" of the statute would mean, according to Coke). Moreover, Coke's *dictum* on this particular point was entirely valueless, for the reasons already noticed.<sup>2</sup> Nevertheless, his utterance in the Third Institute, like every other printed utterance of that man of prodigious learning, counted for a great deal. Professional opinion began to change, at any rate, not long after this time. The change must have been matured before the Restoration of Charles in 1660; for immediately upon the Restoration, and in the very first year of it, in spite of all the power of the restorers and of their bitter and dominating purpose to punish the death of Charles I., and in spite of the large grist of traitors upon whom to whet their appetite for revenge, the whole aspect of affairs changes. Foremost comes the statute of 1661, the first treason act passed after the restoration, in which the rule of two witnesses is deliberately established for all treasons defined by that act.<sup>3</sup> Next, but equally significant, came the judicial overthrow of the century-long construction of the statute of Mary. It was now affirmed by the courts, and assumed and practised when not expressly affirmed, that the statute of Mary had *not* repealed the statute of Edward; so that two witnesses were now to be required for treasons at large. The remarkable thing is that this decision was reached, in the first instance, in the very year of Charles's restoration, and in the trial of the regicides themselves, against whom the greatest license of judicial harshness might have been expected;<sup>4</sup> and it was repeated and maintained on all other

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verdict of twelve men, and so a manifest diversity between the evidence to a jury and a tryall by jury").

<sup>1</sup> Thayer, Preliminary Treatise, 17-24.

<sup>2</sup> *Ante*, p. 100.

<sup>3</sup> 1661, St. 13 Car. II, c. 1, § 1 (for treasons under this section, persons must be "legally convicted thereof upon the oaths of two lawful and credible witnesses, upon trial, or otherwise convicted or attainted by due course of law"); § 5 (no persons shall be convicted of the treasons in this act unless accused "by the testimony and deposition of two lawful and credible witnesses upon oath," produced face to face, etc., as in St. 5 & 6 Edw. VI, *supra*).

<sup>4</sup> May, 1660, Regicides' Case, Kel. 9 (it was assumed that the law for two witnesses was in force).



occasions during the remaining years that fate had allotted to the Stuart family under Charles II. and James II.<sup>1</sup> Here again is laid bare the fallacy of the Whig dogma of the 1700s, that all the evil judicial practices occurred under the Stuarts, while all the reforms came in with the Revolution. The reform in this instance came with the very first moment of the Stuart Restoration. Dangerous and unwholesome as was undoubtedly the restoration of this worthless family, the judges of the time must be redeemed from the reproach of an unscrupulous and tyrannous application of the law. On the contrary, it was through them that the change began. It is merely another instance out of several, in which we are to date the improvements in trial procedure from the Restoration, and not from the Revolution. Policy, no doubt, as well as a real growth of sentiment, and a sagacious perception of the wisdom of maintaining the restored power by abandoning the excesses of the earlier Stuarts, furnished in part the motives. But the fact remains, and deserves to be recorded.

(4) The ensuing legislation of William III,<sup>2</sup> after the Revolution, established the law, by continuing in a general statute that which the Restoration had instituted, partly by statute and partly by judicial action, a generation before. From the beginning of the

<sup>1</sup> Dec. 1662, *Tong's Case*, Kel. 22 (though some of the judges believed that there had been a repeal, yet "they all agreed that *if* the law for two witnesses be in force," it was to be interpreted in a certain way; but at page 49, Kelyng expresses his own opinion in favor of the repeal; this was not later than 1671, the year of his death); 1679, *Whitebread's Trial*, 7 How. St. Tr. 405; 1680, *Lord Castlemaine's Trial*, ib. 1111; 1680, *Lord Stafford's Trial*, T. Raym. 407; 7 How. St. Tr. 1293, 1527. The same result on this point is seen in the interpretation of the statute (already noticed) against treason by false coining: 1673, *R. v. Acklandby*, 3 Keb. 68 (clipping the coin; two judges apparently differed in opinion); 1684, *Anon.*, T. Jones, 233 (clipping the coin; at a conference of the judges it was resolved that by the statute of 1 & 2 M. "one witness is sufficient, for that restores the trial at common law for such case, which was altered generally for all cases of treason by 1 Edw. VI. and 5 & 6 Edw. VI., which required two witnesses where one was sufficient by the common law"). Lord Hale, writing some time before 1680, utters inconsistent views: Hale, Pl. Cr. i. 300 (after examining the *pros* and *cons*, he ends: "thus the reasons stand on both sides, and though these [for repeal] seem to be stronger than the former," yet it is safest to err on the side of mercy); ii. 286 (the early statute "is not altered by the statute of 1 & 2 P. M.;" citing Coke).

<sup>2</sup> 1696, St. 7 W. III. c. 3, § 2 (no person shall be indicted or tried for high treason working corruption of blood, or misprision, "but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to the one and the other of them to another overt act of the same treason," unless the accused "shall willingly, without violence, in open court confess the same, or stand mute or refuse to plead"); c. 7 (the foregoing provision is not to extend to counterfeiting the coin).

1700s there has never been any doubt or vacillation upon the rule that two witnesses at least are required upon a charge of treason.<sup>1</sup>

### III. *The Perjury Rule.*

By the end of the 1600s it was decisively settled, as we have just seen, that the ecclesiastical rules about numbers of witnesses were not to be adopted into the common law. It was after that time that there arose the single exception to the common law doctrine that one witness alone may suffice in every case, namely, the rule that one witness, without corroborating circumstances, does not suffice on a charge of perjury. Yet even this rule was an indirect borrowing from the civil law.

First of all, it is fairly clear that there was no such rule of common law until towards the first half of the 1700s.<sup>2</sup>

That the quantitative conception of an oath still prevailed at that time has been already noticed, and in this respect the acceptance of the rule is not strange. But why should an exceptional step have been taken at that epoch for perjury trials which was not taken, either before or after, for any other kind of common law trials? The causes that answer this question are scarcely to be mistaken, and they were two: one may be called a mechanical, the other a moral cause.

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<sup>1</sup> There has, however, been some change as to the scope of the treason to which the rule applied: 1800, St. 40 Geo. III, c. 93 (in trials for treason by killing or doing bodily harm to the King, the trial may be "upon the like evidence as if such person or persons stood charged with murder"); 1821, St. 1 & 2 Geo. IV, c. 24 (extends the St. 7 W. III, to Ireland); 1842, St. 5 & 6 Vict., c. 51 (similar to St. 40 Geo. III); 1848, St. 11 & 12 Vict., c. 12, § 4 (in trials for compassing death or bodily harm to the King, etc., no conviction is to be had for this so far as expressed by "open or advised speaking," unless "upon his own confession in open court, or unless the words so spoken shall be proved by two credible witnesses"). Compare, also, the statutes *ante*, p. 102, as to treason by false coining.

<sup>2</sup> The following seem to be the earliest cases: 1693, *R. v. Fanshaw*, Skinn. 327 ("There being but the oath of the prosecutor, and so oath against oath, the defendant was acquitted"); 1714, *Parker, C. J.*, in *R. v. Muscot*, 10 Mod. 192 ("There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent, and therefore a credible and probable witness shall turn the scale in favor of either party. But in the former, presumption is ever to be made in favor of innocence, and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath; this was said in charging a jury, and no precedent was cited); 1736, *R. v. Nunez, Lee cas. t. Hardw.* 265 (Lord Hardwicke, C. J. ["One witness is not sufficient], unless there were very strong circumstances; because one man's oath is as good as another's"); 1745, *R. v. Broughton*, 2 Str. 1229.

(1) The first of these lay in the important circumstance that in 1640, towards the end of Charles the First's reign, the Court of Star Chamber had been abolished<sup>1</sup> and its jurisdiction transferred to the King's Bench. Now the proceedings of the Star Chamber Court, being presided over by the Lord Chancellor, had always been conducted according to the ecclesiastical or civil law, by following or adopting its methods, much as did the Court of Chancery; and, in particular, the ecclesiastical rule of two witnesses obtained therein.<sup>2</sup> Furthermore, the crime of perjury, though also cognizable as a statutory crime in the ordinary criminal courts, was practically dealt with almost exclusively in the Star Chamber.<sup>3</sup> Hence, on the one hand, there was little or no occasion for any question to arise before 1640 as to proof of perjury in a common law court; while, on the other hand, after the transfer of jurisdiction at that date, the notions of proof as well as the definitions of substantive law peculiar to perjury were likely to pass over and be adopted as a whole in the subsequent common law practice. There was, therefore, by this change of mechanism, a tradition prepared, by the middle of the 1600s, for an exceptional doctrine to be established for proof of perjury; and by the end of the 1600s (as exhibited in the cases above cited) such a doctrine was making its appearance.

(2) But why did not the corrective consideration, already noted, which applied to prevent such a numerical rule in other common law trials, apply here also, namely, the consideration that the jurors were themselves twelve witnesses, as being capable of and entitled to contribute information of their own? In the first place, the living strength of this consideration had by the beginning of the 1700s substantially disappeared,<sup>4</sup> and in this must probably be sought the real explanation why the perjury rule was able to obtain a firm footing. In other words, the quantitative notion of an oath

<sup>1</sup> St. 16 Car. I. c. 10.

<sup>2</sup> *Ante* 1635, Hudson, Treatise of the Star Chamber, 223, in Hargrave's *Collectanea Juridica*, vol. ii. ("they always require indifferent witnesses' clear proof, not by relation, and double testimony, or that which amounteth to double testimony").

<sup>3</sup> 1596, *Dampport v. Sympton*, Cro. El. 520 ("Until the statute of 3 H. VII. c. 1, which gives power to examine and punish perjuries in the Star Chamber, there was not any punishment for any false oath of any witness at the common law"); 1883 Sir J. Stephen, *History of the Criminal Law*, iii. 245 ("The present law upon the subject . . . originated entirely, as far as I can judge, in decisions by the Court of Star Chamber"). Hudson, *ubi supra*, p. 71, says that perjury was "usually punished" there.

<sup>4</sup> Thayer, *Preliminary Treatise*, 174.

was still popular enough, while the corrective notion — that of the jury as witnesses — had practically disappeared, and thus the way was open. Furthermore, a charge of perjury was the one case where a plausible inducement for such a rule was presented; because in all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused's oath was always in effect in evidence, and thus, if but one witness was offered, there would be merely (as Chief Justice Parker said) oath against oath. Thus, in a perjury case, the quantitative theory of testimony would present itself with the greatest force. Such seems to be the course of thought which made possible the tardy introduction of this rule.

It found a permanent place, however, in the common law; for, in spite of a perception of its incongruity with modern ideas, and of an occasional hesitation, the rule, persisting through the 1700s, was fully confirmed in England in the 1800s.<sup>1</sup>

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<sup>1</sup> 1831, *R. v. Mudie*, 1 Moo. & Rob. 128 (perjury in swearing to an insolvent schedule by omitting certain debtors; the debtors testified each to the existence of his own debt; Lord Tenterden thought it "difficult to give any other evidence," and said that on conviction a new trial might be moved; but there was an acquittal); 1839, *R. v. Gardiner*, 8 C. & P. 737 (rule applied); 1840, *R. v. Virrier*, 12 A. & E. 317, 324 (rule applied); 1842, *R. v. Parker*, Car. & M. 639, 646, Tindal, C. J. (similar to *R. v. Mudie*; rule applied).

## THE ENGLISH REPORTS, 1292-1865.

## II.

**T**HE chancery reports are of comparatively recent origin. It is not until the last years of the seventeenth century that we have any satisfactory reports of the chancellors' determinations. Sir John Mitford (afterward Lord Redesdale), writing at the end of the eighteenth century, could still complain of the extreme scarcity of authority; and Lord Eldon, some years later, described Mitford's book as "a wonderful effort to collect what is to be deduced from authorities speaking so little that is clear." This slow development was the natural result of the auxiliary nature of the equitable jurisdiction and of the discretionary character of its early administration.

The judicial functions of the chancellor were the incidental outcome of his political power. Like the chief justiciar, whom he succeeded, the early chancellor was primarily a great officer of state. As an ecclesiastic he was likely to be more or less learned in the civil law, but his selection was due entirely to political considerations. The vast proportion of the early cases in chancery arose out of the violence and outrage which disturbed the administration of justice in the common law courts. An humble suitor deprived of his rights by a powerful adversary naturally appealed to the dignitary who wielded the whole executive power of the state. Although the chancellor's judicial functions had become very prominent by the end of the fourteenth century, they were entirely subordinate to and the result of his political station. Cardinal Wolsey, the last of the race of chancellors who combined both political and ecclesiastical power, was a typical example of the class; he was both prime minister and keeper of the king's conscience, and, secure in the former office, he ventured in the exercise of the latter to lengths which called general attention to the arbitrary nature of his power. Other causes, it is true, contributed to bring about a change. The original reasons for interference with the common law administration of justice had by this time become, to a large extent, obsolete. The strong central government established by the Tudors soon suppressed most of the internal disorder and violence that had flourished during the Wars of the Roses; and jurisdiction over such cases was thereafter taken

over by the Star Chamber. Moreover, as the common law became settled and more uniformly administered in accordance with recognized principles and precedents, it became necessary that equity should be administered in a more regular and systematic manner. The first step was obviously the employment of lawyers as chancellors, which began with Wolsey's successor, Sir Thomas More, and was regularly adhered to after the time of Lord Keeper Coventry. Under the Tudors and the first two Stuarts the professed basis of the chancellor's jurisdiction was the correction of the common law in cases where by reason of the universality and inelasticity of its principles injustice was likely to be done. Its great weapon was the writ of injunction. Lord Ellesmere, who is practically the first chancellor whose decrees have come down to us, is perhaps the most conspicuous representative of this period. His appointment was due to his professional acquirements; he did much toward settling the practice and procedure of the court; most of all, he successfully fought the great fight with Coke over the supremacy of the chancellor's writ of injunction. It was during the period from Ellesmere to the Restoration that the real foundation was laid of an equitable system modifying ancient common law principles and practices which no longer agreed with current views of justice.<sup>1</sup>

It is not to be expected, moreover, that much attention would be paid to the preservation of precedents in chancery so long as the chancellor's conscience was supposed to be untrammelled by definite rules. The general principles upon which the early chancellors were supposed to act were variously expressed by the terms conscience, good faith, reason, and, rarely, equity. But down to the reign of Elizabeth, at least, the chancellors' decrees were, as Blackstone says, "rather in the nature of awards formed on the sudden, *pro re nata*, with more probity of intention than knowledge of the subject, founded on no settled principles, as being never designed, and therefore never used, for precedents." In his efforts to establish some sort of fixed practice Lord Ellesmere frequently

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<sup>1</sup> Nevertheless, instances of specific relief under what became in after times the great heads of equity may be found at a surprisingly early day. The editor of the Selden Society's volume of Select Cases in Chancery gives the following list of the earliest cases: Accident, after 1398; account, 1385; cancellation and delivery of instruments, 1337; charities, after 1393; discovery, 1415-17; dower, 1397; duress, 1337; fraud, 1386; injunctions, 1396-1403; mistake, 1417-24; mortgage, 1456; partition, 1432-43; perpetuation of testimony, 1486-1500; rescission of contract, 1396-1403; specific performance, after 1398; trusts, after 1393; waste, 1461-67; wills, after 1393.

referred to precedents, but numerous instances of his vicarious charity reveal the latitude of his discretion ;<sup>1</sup> indeed, in the Earl of Oxford's case,<sup>2</sup> he expressly claimed the power to legislate on individual rights.<sup>3</sup> As late as the Commonwealth period Whitelock was led to decline the seals from an overwhelming sense of the personal responsibility of the office. "The judges of the common law," he said, "have certain fixed principles to guide them ; a keeper of the seal has nothing but his own conscience to direct him, and that is oftentimes deceitful. The proceedings in chancery are *secundum arbitrium boni viri*, and this *arbitrium* differs as much in several men as their countenances differ." Lord Nottingham's view that it was only with such a conscience as was *civilis et politica*, not *naturalis et interna*, that the chancellor had to do,<sup>4</sup> marks the beginning of modern conceptions.<sup>5</sup>

During all these centuries of development we have only a dozen small volumes of so-called chancery reports ; in reality they are little more than brief notes on procedure. Of this sort are the cases collected by William Lambert and published under the name of Carey, their editor (1557-1604), which are mostly mere extracts from the registrar's books, and the so-called Choyce Cases in Chancery (1557-1606), consisting of a collection of notes of cases

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<sup>1</sup> For instance : "The pitiful cries of the father and mother dying as aforesaid [they died of the plague] and of the poor orphans called to God for relief, and moved the heart of the Chancellor to take compassion upon them and to take such order as he hath done" (Cooper, Proc. in Parl. 5).

<sup>2</sup> 2 W. & T. 644.

<sup>3</sup> "The Chancellor is by his place under his Majesty to supply that power, *i. e.* of Parliament, until it may be had in all matters of *meum* and *tuum* between party and party ;" and he said "the cause why there is a chancery is for that men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet every particular act and not fail in some circumstances."

<sup>4</sup> Cook v. Fountain, 3 Swanston, 600. Nottingham drew his own portrait when he said of Hale, "He looked upon equity as a part of the common law and one of the grounds of it ; and therefore, as near as he could, he did always reduce to certain rules and principles, that men might study it as a science and not think the administration of it had anything arbitrary about it."

<sup>5</sup> Lord Eldon's well-known declaration in *Gee v. Pritchard*, 2 Swanston, 414, marks the conclusion of the process of binding down the chancellor's discretion : "The doctrines of this court ought to be as well settled and as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed by every succeeding judge. Nothing would inflict on me greater pain than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot." Since Eldon's time the development of equity has been effected by strict deduction from established principles.

(mostly between 1576 and 1583), together with a little treatise on chancery practice. These two volumes contain brief records of many of Ellesmere's decrees. Tothill's meagre and imperfect notes extend from Elizabeth to Charles I. (1559-1646). These three collections, which are concerned principally with the reign of Elizabeth, give some idea of the matters dealt with in chancery; but they are extremely brief and unsatisfactory, often giving merely a bare statement of the facts of a case and the final decree, without any indication of the grounds of the judgment.

The seventeenth century reports are not much better. The volume known as *Reports in Chancery* (1615-1710) is made up mostly of notes of special cases from the reign of Charles I. Nelson (1625-93) records several cases decided by Lord Keeper Coventry, and a few by Littleton and the Parliamentary commissioners. The so-called *Cases in Chancery* (1660-90) is the best of the earlier reports; it gives in most cases a fair abstract of the chancellor's judgment, and a few cases are reported quite fully. Dickens's reports, which extend over a period of more than two hundred years, include some notes of cases as early as the sixteenth century. Freeman's notes (1676-1706) are unimportant.

In fact, the chancery reports prior to the Restoration are of secondary importance. The official records of the chancery, which begin in the seventeenth year of the reign of Richard II., afford a much more satisfactory and reliable guide to the early history of equity. A selection of these early records, from Richard II. to Elizabeth, has been published by the Record Commission under the title of "*Calendar of Proceedings in Chancery*."<sup>1</sup> The Selden Society proposes to carry on the work thus begun, and has already published its first volume, "*Select Cases in Chancery, 1364-1471*."<sup>2</sup> A collection of abstracts from the masters' reports and from the registrars' book, published by Cecil Monro under the title, "*Acta Cancellariae, 1545-1624*," further illustrate early

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<sup>1</sup> This work is a sort of index to the vast mass of documents brought to light by the commission. In almost all cases, however, the printed volume gives the names of the parties, together with the purpose of the bill and a description of the property. The forms of equity pleading are illustrated by examples of bills and petitions in various reigns. The record consists of the bill, and after written answers were introduced, the answers and further pleadings, together with occasional reports of the examinations of defendants, copies of the decrees entered and of the writs issued.

<sup>2</sup> Lest it be thought that these records deal only with legal antiquities, it may be well to note the case (No. 23) of the poor herring hawker of Scarborough, who travelled up into Huntingdonshire and was there assaulted by his local rivals because he sold his merchandise below their rates.



practice, and serve to correct and supplement many of the reported cases.

The Restoration, or rather the chancellorship of Lord Nottingham (1673-82), marks an epoch in the history of equity. It is the starting point of modern equity, of which Nottingham has been justly called the "father." The interference of the chancellors had been instrumental in bringing about, through legislation and otherwise,<sup>1</sup> a steady improvement in common law practice and procedure, and the necessity for further intervention, except where there was an avowed divergence between the two systems, had become rare. Then the abolition of the incidents of feudal tenure by the Restoration Parliament introduced a system of real property which continued almost to the reign of Victoria. Controversies arising out of these new methods of conveyancing and settlement naturally found their way into chancery, where alone trusts were recognized, mortgages redeemed, and contracts specifically enforced; and the contemporaneous abolition of the court of wards ultimately turned the guardianship of the estates of infants into chancery. Moreover, the searching investigations which had been made during the Commonwealth exercised a powerful influence in the direction of reform in procedure. All these influences combined to form a new era in equity. Prior to the Restoration it could be said with entire accuracy that "the grand reason for the interference of a court of equity is the imperfection of the legal remedy in consequence of the universality of legislative provisions." But during the period from Nottingham to Eldon the chancellor was chiefly occupied with the adjudication and administration of proprietary rights. At the close of Lord Eldon's service equity was no longer a system corrective of the common law. Its principles were no less universal than those of the common law. It could be described only as that part of remedial justice which was administered in chancery; its work was administrative and protective, as contrasted with the remedial and retributive justice of the common law.

Lord Nottingham's very important chancellorship is covered by the folio volume entitled *Reports temp. Finch* (1673-80), which is made up of cases in which the reporter was counsel. The work is miserably executed; the statement of facts is defective, and there is only an occasional statement of the arguments; the report concludes with a mere abstract of the decree, without any refer-

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<sup>1</sup> For example, the introduction of new trials with reference to the evidence and the enactment of the statute of frauds.

ence to the reasoning upon which it is based. The only reports at present available that do any sort of justice to the great chancellor's reputation are those published by Swanston in an appendix to the third volume of his chancery reports.<sup>1</sup>

The manuscript of Vernon's reports (1681-1720) was found in the study of that eminent lawyer after his death. Although these volumes constitute our first considerable collection of chancery cases, the reports are very brief and are often inaccurate; they are a most inadequate memorial of the labors of such distinguished chancellors as Nottingham, Somers, and Cowper.

The first clear and accurate chancery reports are those prepared by Peere Williams (1695-1736). These excellent reports cover a period during which eminent lawyers presided in chancery, and they have always been regarded as one of the classical repositories of equity. Their value has been enhanced by Cox's scholarly annotations.<sup>2</sup> *Precedents in Chancery* (sometimes called *Finch's*, 1689-1722), generally supposed to be the notes of Pooley, the reputed author of *Equity Cases Abridged*, is of fair repute. *Gilbert* (1705-27) is of little value. King's chancellorship is covered by the reports bearing his name (1724-34) and by *Moseley* (1726-30), neither of which is particularly good. *Cases temp. Talbot* (1731-37) is somewhat better. *W. Kelynge* (1731-36) contains notes of cases by both King and Talbot.

Of all the great lawyers who have administered equity Lord Hardwicke admittedly stands at the head. The desirability of an authentic collection of his perspicuous and invaluable opinions prompted an undertaking some years ago to reprint his cases, revised and corrected from original manuscript.<sup>3</sup> Unfortunately the work was abandoned after completing the first three years. Meanwhile our main reliance for Hardwicke's work is *Atkyns* (1736-54), *Vesey, senior* (1746-56), and *Ambler* (1737). These reports, although much improved in subsequent editions, are extremely unsatisfactory; their statement of facts is often defective, their reports of the arguments of counsel are far from lucid, and

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<sup>1</sup> These cases were taken from the chancellor's note-books, which are said to record more than a thousand cases. It is to be hoped that we may one day have them in print.

<sup>2</sup> Peere Williams gives several special cases from the King's Bench. The distinction between common law and chancery is not strictly observed in many of the earlier reports. There are occasional chancery cases in the common law reports of *Ventris*, *Salkeld*, *Fortescue*, *Comyns*, *Fitzgibbon*, *Strange*, *Kelynge*, *Ridgeway*, *W. Blackstone*, *Kenyon*, and others.

<sup>3</sup> *West* (1736-39).

sometimes they give an incorrect report of the decree. Dickens's brief reports (1559-1798), which deal for the most part with the last half of the eighteenth century, are the work of a registrar of the court. Other decisions by Lord Hardwicke are scattered through 9th Modern, Ridgeway, Lee, Kenyon and Cox.

The services of Lord Keeper Henley are recorded by Eden (1757-66), and much more satisfactorily than by the brief and inaccurate reports of Ambler, which also extend through this period. Unfortunately, the second part of Ambler is our main reliance for Lord Camden's work. Most of Lord Thurlow's service is covered by Cox's perspicuous and accurate reports (1783-96). These volumes, which may be termed the first complete reports in chancery, also record part of Lord Loughborough's service as chancellor as well as Kenyon's decisions as master of the rolls. Brown's reports (1778-94), extending over part of the same period, are not so trustworthy; but they have been improved by the annotations of Eden and Belt. The first five volumes of Vesey, junior, cover the last years of Thurlow's service, all of Loughborough's, and include Sir Pepper Arden's decisions as master of the rolls.

Lord Eldon's herculean labors are preserved in some thirty volumes, of which the reports of Vesey, junior (1789-1816), record nearly one half. These very important reports were much improved by Belt's subsequent annotations and corrections. They contain also most of Sir William Grant's decisions as master of the rolls. Lord Eldon's other reporters are Vesey and Beames (1812-14), Cooper (1815), Merivale (1815-17), Swanston (1818-19), Jacob and Walker (1819-21), Jacob (1821-22), and Turner and Russell (1822-24).

The strong personalities of Lyndhurst and Brougham did not suffice to conceal their deficiencies in special learning, and their administration of equity, as recorded in Russell's reports, failed to add to their reputation. Lord Cottenham, on the other hand, was deeply learned in the principles and practice of the chancery jurisdiction, and the ten volumes of reports of his decisions by Messrs. Mylne, Craig, Phillips, Macnaghten and Gordon are among the most authoritative expositions of technical equity. But the twenty volumes of reports by De Gex and his several associates (1851-65) have probably been cited oftener in later times, and have carried more weight than any of the contemporary chancery reports. Their standing is not due entirely to the ability of the chancellors during this period, — although the list includes, besides Cranworth, Campbell, and Chelmsworth, such eminent equity law-

yers as St. Leonards and Westbury,— but also to the fact that they record the labors of Lords Justices Knight-Bruce and Turner in the Court of Appeal in Chancery.

The decisions of the masters of the rolls, which have been regularly reported in a separate series since 1836, are, as a whole, inferior to those of the vice-chancellors. Lord Langdale's work, as reported by Keen (1836-38) and Bevan (1838-66), is eminently respectable; but the last twenty-three volumes of Bevan's reports, containing Lord Romilly's decisions, have not been highly esteemed, although the labors of a very able bar supplied many deficiencies.

The seventy volumes of reports of the proceedings of the vice-chancellors vary considerably in authority. Beginning in mediocrity, they advance steadily in value. The work of the first vice-chancellors, Plumer and Leach, as reported by Maddock (1815-22) and Simons and Stuart (1822-26), carries little weight. The same may be said of Smale and Giffard's reports of Vice-Chancellor Stuart's decisions. The services rendered by their successors, Shadwell and Kindersley, reported by Simons (1826-52) and Drewry (1852-65), show much improvement. The labors of Knight-Bruce, as recorded in Younge (1841-43), Collyer (1844-45), and De Gex (1846-52), and of Wigram and Turner, in Hare (1841-53), were of a very high order, often outranking in the estimation of the profession the determinations of the chancellor himself. Probably the most substantial contribution to equity was made by Vice-Chancellor Page-Wood, whose very able discharge of the duties of this position led to his subsequent elevation to the wool-sack as Lord Hatherley. The reports of Hare, Kay, Johnson, and Hemming from 1853 to 1865, covering most of his service as vice-chancellor, have probably been cited oftener than any other reports from this court.<sup>1</sup>

The ecclesiastical and admiralty courts and the appellate jurisdiction of the House of Lords and the Privy Council present no great difficulties. As a system of judicial precedents the ecclesiastical and maritime jurisdictions practically date from Lord Stowell's time; since then the proceedings of these courts have

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<sup>1</sup> The decisions rendered by Lord Redesdale (1802-06) and by Lord St. Leonards (1834-35; 1841-46) as lord chancellors of Ireland, although not strictly binding on English courts, have always been cited with such deference that they have come to partake of the nature of authoritative precedents. Lord Redesdale is reported by Schoales and Lefroy; Lord St. Leonards in iv.-ix. *Irish Equity Reports*, and by Messrs. Lloyd, Goold, Drury, Warren, Jones and Latouche.

been quite fully reported. The judgments of the House of Lords during the eighteenth century are recorded by Brown and Tomlins; the reasons upon which some of these judgments are based may occasionally be found in the common law and chancery reports of the time. Complete reports of appeal cases date from 1812; since then, with a single break between 1825 and 1827, the judicial proceedings of the House have been admirably reported. Regular reports of the judicial proceedings of the Privy Council practically begin with the organization of the Judicial Committee.

The present method of systematic reporting dates from 1865. The "authorized" reports, conducted in each court separately as commercial undertakings, were costly and dilatory. Aside from frequent duplication in particular courts, several legal newspapers issued reports of their own which were cheaper, more prompt, and often superior to their rivals. This competition involved an immense waste of time, labor and money. At length, in 1863, a committee of the Bar devised the present system of coöperative reporting, which soon superseded the old reports. The regular reports are now issued under the general supervision of the Incorporated Council of Law Reporting, assisted by the General Council of the Bar.

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## THE RIGHT OF ASYLUM IN THE LEGATIONS OF THE UNITED STATES IN CENTRAL AND SOUTH AMERICA.

THE right of asylum finds its origin, basis, and excuse in a passion coeval with human nature,—the desire for vengeance. From the holy city of refuge of King David's time to the Hidalgo case in Ecuador, the underlying principle has been the same,—not a matter of legal right, but the conflict on the one side of a frenzied thirst for revenge, and on the other of the cooler, higher counsel of humanity and self-control. Nations have attempted to call in certain doctrines of recognized international law in justification, or to engraft, by means of a fiction or by figures of speech, excrescences upon the body of international jurisprudence; but it will be found that the so-called "right" is the product of circumstances, and that the recurrence of conditions resembling those wherein it had its birth is to-day the cause of its revival; in other words, that the "right of asylum" is no right at all, but merely a privilege granted or claimed where its use finds sanction in the necessities of a mutable condition of society.

In those countries in which the government is stable and enduring and the local law dominant, the privilege is seldom called in question, but has fallen into "innocuous desuetude," simply because there has been no necessity for its exercise, until to-day it is doubtful if in one of the greater nations of the world its existence would be either claimed or conceded. However, in those states comprehended under the term "Spanish-American countries," the conditions favoring its use have so frequently occurred that it has continually been the subject of diplomatic correspondence; there has seemed something inherent in the Spanish character demanding the interposition of a restraining hand at certain recurrent crises in the political lives of those countries. Thus it is that almost every instance of the attempted exercise of the privilege by an American minister has occurred in one of the so-called republics of Central and South America. Accounts of at least thirty-five instances<sup>1</sup> upon the Western Hemisphere wherein the question of

<sup>1</sup> (1.) 1851, Chili. (2.) 1853, Peru. (3.) 1854, Peru. (4.) 1855, Nicaragua. (5.) 1859, Chili. (6.) 1865, Hayti. (7.) 1865, Peru. (8.) 1867, Peru. (9.) 1868, Paraguay. (10.) 1868, Hayti. (11.) 1869, Hayti. (12.) 1870, Guatemala. (13.) 1871,

asylum has been opened appear in our Foreign Reports, — 13 in Hayti, 4 each in Bolivia, Chili, and Peru, 2 each in Ecuador, Guatemala, and Nicaragua, and 1 each in Colomb'ia, Mexico, Salvador, and Paraguay, — the earliest of these cases being that in Chili in 1851, and the latest in Ecuador under Mr. Olney. Of all these, the more important instances have been that involving the romantic and spectacular career of General Boisrond Canal, in Hayti, in 1875, wherein the use of asylum was deprecated and disavowed as far as seemed consistent with the dignity of our flag, and that extended use to which the privilege was put by Minister Egan, in Chili, in 1891, in which, so far as may be gleaned from official correspondence, the position of our representative was supported by his government.

It may be most profitable to take up these matters in chronological order, to see if our government has throughout maintained a consistent attitude, and afterward to discuss the foundations of the various claims and the principles involved.

#### HISTORICAL.

Prior to the date with which this summary begins, several detached instances of the exercise of the right of asylum in Central and South America are to be found, and, in the instructions of Mr. Livingston, Mr. Calhoun, Mr. Buchanan, and Mr. Clayton, secretaries of state, the general tenor prevails that the privileges are "more liberally construed in the Mohammedan states and in South America than in the leading European states, but they should be in all cases guarded." Mr. Calhoun once states, "They must be indulgently construed." 1. In 1851, Mr. Webster took a position considerably different from that of his predecessors, stating that although acquiescence by the government of Chili on former occasions might preclude that government from objecting to the continued granting of such hospitality, yet, "if it makes objection . . . our minister should advise the particular political refugees that shelter can no longer be afforded," — a sort of imperfect estoppel. 2. In 1853, Mr. Marcy, Secretary of State, denied the right of consuls to "afford protection to those who have rendered themselves obnox-

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Salvador. (14.) 1872, Hayti. (15.) 1873, Hayti. (16.) 1875, Bolivia, Jan. 19. (17.) 1875, Bolivia, Feb. 20. (18.) 1875, Bolivia, March 20. (19.) 1875, Hayti, May 1. (20.) 1875, Bolivia, Oct. 5. (21.) 1877, Mexico. (22.) 1878, Hayti. (23.) 1879, Hayti. (24.) 1885, Colombia, Feb. 23. (25.) 1885, Hayti, Nov. 7. (26.) 1888, Hayti. (27.) 1890, Hayti. (28.) 1890, Guatemala. (29.) 1891, Chili. (30.) 1892, Hayti. (31.) 1893, Nicaragua. (32.) 1893, Chili, April 10. (33.) 1895, Ecuador. (34.) 1896, Hayti, Feb. 3. (35.) 1896, Ecuador, March 12.

ious to the authority of the government under which they dwell." And he refused to see any insult to our flag in the arrest of the refugees within the consulate. "The flag had been unwarrantably used." (Peru.) 3. In 1854, on a demand that all refugees should leave the republic, our minister to Peru insisted that foreign legations were "entirely extraterritorial," and that the right in question had been officially recognized and constantly respected by all the governments, since the independence of Peru, within its borders. 4. In 1855, Mr. Marcy repeated his instructions of 1853 almost verbatim in a case arising in an American consulate in Nicaragua. 5. In 1859, the United States consul in Valparaiso, Chili, undertook to protect certain political refugees. His house was attacked by soldiers, the refugees taken, and his "exequatur" recalled. Secretary Cass instructed our minister resident, "The existence of a usage of asylum such as you mention would go far to induce this government to require the restoration of Mr. Trevitt's exequatur." It seems, however, that the exequatur was not restored. The violence of the entrance effected seems to have been uppermost in Mr. Cass's mind. 6. In 1865, our minister to Hayti was instructed that consuls have no right to harbor political refugees, and there could be no cause of complaint if refugees so harbored were to be taken from the consular abode. 7. In 1865, in Peru, occurred one of the most notable cases. In May, General Canseco took refuge in the American legation, where our minister refused to surrender him, a position taken in common with the other ministers resident. He soon after escaped, and was instrumental in the overthrow of the existing government when members of the defeated party in turn sought refuge. Mr. Hovey, a new minister, had by this time (December 20) succeeded Mr. Robinson, and refused to grant asylum, stating in contradiction to the French minister, who said, "Its benefits amply compensate for a fault inspired by the sentiment of humanity," that "The houses of foreign ministers have become little less than the abode of criminals who flee from the vengeance of the law. . . . The practice leads to very evil consequences." His position was expressly sanctioned at Washington. 8. In 1867, in a conference of the various ministers to Peru, Mr. Hovey endeavored to have Peru recognized as a "Christian nation," "the law of nations as relating to the question of asylum to be the same as practised in the United States, and the Christian nations of Europe." He was strenuous in his endeavor to abolish the right, but the other ministers were united against him. But the Peruvian government finally declared that it "renounced its



right of her legations in other South American states to the said privileges, and denies the same to the legations of such states in Peru." This seems to have effectually cleared the atmosphere in this country, for there is no subsequent record of Peru upon the books of the United States.

9. In 1868, Washburn, minister to Paraguay, gave shelter to a number of political refugees, including two American citizens. A list of them having been furnished to the government, they were demanded, and the Americans seized as they were accompanying Mr. Washburn out of the country. They were subsequently released upon demand of Admiral Davis, backed up by an American man-of-war. No complaint was made by Secretary Seward as to the refusal of the Paraguayan government to permit the continuance of the practice, but in his note of January 14th he said: "Your intention to afford asylum in the legation to those who may resort to it, save notorious criminals, as far as it can be done without compromising your neutral character, is approved." 10. At about the same time, May, 1868, Mr. Seward was instructing Mr. Hollister, minister to Hayti: "We are prepared to accept your opinion that it is no longer expedient to practice the right of asylum in the Haytien republic. Nevertheless, we should not be willing to relinquish the right abruptly . . . nor any sooner, nor in any greater degree, than it is renounced by the legations of the other important neutral powers . . . the exercise of the right should be attended with delicacy and no display of arrogance." 11. In the following year, Mr. Secretary Fish, who gave our policy a strong impetus in its present direction, began to take a more radical position. He says to Mr. Bassett at Hayti: "While you are not required to expel . . . you will give them to understand that your government cannot assume any responsibility for them, and especially cannot sanction any resistance by you to their arrest by the authorities for the time being." 12. In 1870, Mr. Hudson, minister to Guatemala, refused to give refuge to one Granadas, at that time eluding arrest for rebellion, but upon the overthrow of the government and the rise of Granadas, he extended the protection of the legation to all parties; whereupon the United States government gave answer: "Your efforts to protect life and property meet with the approval of this department." 13. In 1871, Duenas, the deposed president of Salvador, took refuge at the American legation, whence he was later surrendered upon the guarantee that his life would be spared, and with his own assent. Mr. Fish regarded the assent as a necessary element in the case,

apparently thus claiming the right to retain the refugee. He subsequently called upon the government to respect its promise of immunity. 14. In 1872, American consuls in Hayti protected refugees without comment from the government, under a "wise discretion and avoidance of misunderstandings." 15. In 1873, Mr. Fish regarded the invasion of the consular office at St. Marc an international discourtesy requiring an emphatic protest and a demand for decided redress, but did not make any claim on account of the fugitives arrested. The year 1875 was prolific of trouble for our ministers in Bolivia and Hayti, in both of which countries mushroom revolutions and counter-revolutions sprung up. In Bolivia four different instances arose (cases 16, 17, 18, 20), while in Hayti our legation was in a state of siege from May 1 to October 5 over the case of General Boisrond Canal, the "pièce de resistance," under this head, of American diplomacy. 16. Minister Reynolds, at La Paz, on January 19, congratulated himself that "no harm has come to any one that asked asylum in this legation." 17. On February 20, he refused asylum to those "connected with the late mutiny, knowing well its character, wherein many murders were permitted in cold blood," but allowed two political refugees to remain who filed statements that they had not been in arms. He also assured the Bolivian government that "under no circumstances could I permit an unfriendly or hostile act toward the constitutional government of Bolivia by any one under the protection of the flag." 18. Upon March 20, he refused asylum to further insurgents on the ground that "they were criminals to be tried for incendiarism and murder in the attack upon the imperial palace," while, October 5 (case 20), he refused General Suarez, who claimed to be a political refugee, not "knowing for what he was sought to be arrested or charged," which position was approved at Washington.

19. In Hayti, May 1st, there was a scene of wild disorder. Illegal arrests had been ordered for three leaders of the opposition party; they, fearing that the arrests were made as cover for assassination, resisted. Two were killed, but General Boisrond Canal fought his way with two relatives to the country house of Minister Bassett, where were three other Haytien gentlemen spending Sunday with the minister. All of the refugees in the legation were demanded, martial law was proclaimed, the whole town was in an uproar, 1500 soldiers were posted around the premises, and threats of incendiarism were made. The minister refused to give a list of the fugitives, asserting that this was a courtesy given in the past

only to expedite the embarkation of refugees, and not to furnish ready identification for a trumped-up indictment. The Haytien government insisted that the refugees were guilty of criminal acts, while Minister Bassett was equally positive (in which opinion the diplomatic corps agreed) that the fugitives were only political offenders, and the arrest was intended as a *coup d'état*. Ingress and egress at the minister's home was blocked, and the continued noise made by the armed forces rendered rest impossible. While Mr. Bassett protested against this outrageous treatment, the Haytien government took an appeal through their minister at Washington to Secretary Fish, and upon September 27th, after a statement by Secretary Fish that the continuance of the indignities would be considered an unfriendly act justifying the visit of a warship, it was agreed that the refugees should be embarked for Jamaica upon surrender to the Haytien officials. During the course of correspondence the following extracts are of importance :

"I shall receive and protect, as I judge best, in my legation, any and every person who may apply." (Stuart, British Minister.) "I do not see how we can ignore it in the face of the practice which has existed here for seventy years. The right of asylum has never been renounced by this government, and it practically has refused to assent to its discontinuance. . . . The Haytien plenipotentiary would not agree to having the exercise of this right taken away from even our consulates in the inferior ports." (Minister Bassett to Secretary Fish.) "These men are considered as being on the territory of the United States and under its protection. I guarantee that they will in no way affect public order while they remain here." (Minister Bassett to Mr. Excellent of Hayti.) "Since the custom is tolerated by the other powers . . . we are not disposed to place the representatives of the United States in an invidious position by positively forbidding them to continue the practice. . . . You have repeatedly been instructed that such a practice has no basis in public law, and is believed to be contrary to sound policy. The course of other states in receiving political refugees is not sufficient to sanction a similar step for us. . . . However, it is not expedient that the refugees should be given up. . . . No matter what our disposition to receive reasons to palliate or justify, it is still in the power of the Haytien government to refuse to be satisfied. . . . It is to be regretted that you allowed your partialities and humanity to overcome that discretion which you were expected to exercise." (Secretary Fish to Minister Bassett.) "The practice has been to tolerate the right in countries of Spanish origin . . . the practice has never addressed itself to the full favor of the government. . . . This government is not by itself and independently disposed to absolutely prohibit its diplomatic representatives from grant

ing asylum in every case. They may exercise the prerogative under their own responsibility. . . . We would prefer, therefore, not to formally assent to the 'propositions you make for its abolishment' without ascertaining the views of other governments." (Secretary Fish to Mr. Preston [Hayti].)

21. In 1877, General Arce took refuge in an American consulate in Mazatlan, Mexico. Notwithstanding our consul announced that he was under his protection, the refugee was forcibly removed. Minister Foster called attention to our discouragement of asylum, but claimed that the act was in bad faith after the assurance by the Mexican government of its respect of the protection. The matter does not further appear in the reports. 22. In 1878, Minister Langston, after giving the names of certain refugees rebelling against the Canal administration, secured their embarkation with the consent of the Haytien government. The diplomatic corps had agreed not to deliver up any one desiring refuge. 23. In the following year in the revolution of that season, Boissond Canal, who had, subsequently to his asylum in 1875, returned and been chosen President, abdicated and claimed again the right of asylum, this time upon a British war vessel. At this time Secretary Evarts thus instructed Langston: "The practice has become so deeply established as to be practically recognized by whatever government may be in power, even to respecting the premises of a consulate, as well as a legation. This government does not sanction the usage, and enjoins . . . the avoidance of all pretexts for its exercise; while indisposed from obvious motives of common humanity to direct its agents to deny temporary shelter to any unfortunates threatened with mob violence, it will not countenance any attempt to knowingly harbor offenders against the laws." 24. Feb. 23, 1885, a controversy arose with the Colombian government over the protection afforded a wealthy citizen in the Argentine legation, and Minister Scruggs delivered himself of the following: "To make the exemption of the minister the more complete, the fiction of 'extritoriality' has been invented, whereby, though actually in a foreign country, he is supposed to remain within the territory of his own sovereign." This view was straightway disavowed by Secretary Bayard, who stated that the argument deduced from this phrase as a basis was utterly fallacious. 25. Nov. 7, 1885. Mr. Bayard to Mr. Thompson, minister to Hayti: "If, as a custom, the practice prevails, the exercise by Americans could not be deemed exceptional, and we should certainly expect such privileges as would be accorded other powers.

But we *claim* no right or privilege of asylum, but discountenance it." 26. The same statement was repeated in 1888 for the benefit of Consul Goutier, for whose instruction it was given in 1885, since he again stated that American consulates did not recognize the privilege of asylum; and (27) to Mr. Douglass in 1890, when the ubiquitous and pyrotechnic General Boisrond Canal, in the shift of fortunes, was again a compulsory guest, this time at the British legation, other persons having sought our shelter. 28. In 1890, in the Barrundia case, where Minister to Guatemala Mizner permitted the authorities to go aboard the U. S. vessel Acapulco after a political refugee, Secretary Blaine, on page 138, Foreign Relations Reports for 1890, urges that the exception to the general doctrine as to asylum has been maintained uniformly in South and Central America. "No nation could acquiesce in the sudden disregard or heed a demand for the peremptory abandonment of a privilege sanctioned by so general a usage." . . . "Even more powerfully do these causes operate to secure a refuge on foreign vessels." And, on page 135: "The most extreme writers hold it part of every nation's independence to grant asylum for those sought to be prosecuted for their political acts." Questions as to the right of asylum upon American ships also arose in 1891 in Salvador, 1892 in Venezuela, and in numerous other instances, but the principles involved are apart from the present subject.

29. On the 29th of August, 1891, upon the defeat of the government forces in Chili, Minister Egan threw open the doors of the American legation to some eighty refugees, among them the family of the defeated president, Balmaceda. Nine days previously he had sheltered some of the revolutionists against the opposition of the then government, which threatened to search the legation to discover them. Police were placed about the legation to arrest all persons entering or leaving the premises. This was on the 30th of August, and they were not withdrawn until January 12, 1892, when Mr. Egan succeeded in embarking those that remained with him, after an expense of some \$5000 for their entertainment, as he states in his dispatch of November 16th. The Chilian government charged that the legation was a hotbed of conspiracy against the state, an allegation which met with a strenuous denial from Mr. Egan, but the feeling which was worked up by the sheltering of the fugitives led to the outbreak against the "Americanos," crew of the Baltimore. Although ultimately giving the refugees permission to leave the country, the Chilian govern-

ment protested to the last that it could consistently grant no "safe conduct." Owing to the Baltimore incident of October 16th, these matters were completely swallowed up in the more trying complications, and little appears from the state department either confirming or negating Minister Egan's attitude in this respect. All that there is appears confirmatory of even Mr. Egan's advanced position:—

"The government of the United States is prepared to consider in a friendly spirit the question as to whether asylum has been properly given, . . . but it cannot allow to pass without firm protest the evidence of disrespect toward its minister. The right of asylum having been tacitly if not expressly allowed to other foreign legations, and having been exercised by our minister with the old government in the interest and for the safety of the adherents of the party now in power, the President cannot but regard the application of another rule as the manifestation of a most unfriendly spirit. The utmost precaution must be taken to prevent any abuse of the privilege of asylum." (Secretary Wharton to Minister Egan.) "I thank your excellency for the recognition which you concede to this legation of a principle which forms an integral part of the international practice of my country,—to grant asylum to the refugees of a political character who seek the protection which civilization and humanity counsel. . . . The refugees are virtually in foreign country [October 17th], and the decree of the minister of justice [subjecting the refugees to the judicial power of Chili] cannot destroy the usages and customs that are international, nor reach the persons who are in the legations and beyond its jurisdiction. . . . Therefore the government is at perfect liberty to concede the safe conducts [citing Chilean instructions at Lima in 1866, and the statement of the Chilean delegate at a congress at Montevideo in 1888], which is a necessary adjunct of the right of asylum. It is absurd to consider that the right of asylum should be made a mockery by converting the legation into a permanent prison." (Minister Egan to Señor Matta.)

Señor Matta contended that safe conducts could not be asked as a matter of right, but only as an act of "courtesy and the spontaneous will of the government," and that he could not grant the same after having indicted the refugees as offenders against the laws of his country. He further contended that, as the right of asylum extended only to the premises of the minister, the constant surveillance was justifiable when done upon the by-roads and streets leading to the legation.

A few minor cases complete this historical résumé:—

30. Jan. 7, 1892, two refugees in Hayti, after asking asylum of Minister Durham, sought refuge in the French legation; Mr. Blaine

said, "Practice discountenanced." 31. In 1893, Secretary Gresham cordially approved Minister Baker's refusal to shelter a Nicaraguan revolutionist. 32. April 10, 1893, Minister Egan became again embroiled in a difficulty in sheltering leaders of the revolutionary party, for whom the public prosecutor had demanded the sentence of death, but who had not been tried. The matter was referred in a friendly way to Washington. Ultimately, it was decided that there was no right of shelter, since, besides the political offenses charged, the refugees were under indictment for "sedition, riot, insurrection, and mutiny," prior to the political disturbance upon which they took refuge; and, upon assurance of civil trial and protection from violence, Minister Egan was instructed to require them to leave the legation. "You are not authorized to protect refugees against police officers for violation of laws." 33. Sept. 1, 1895, General Savasti, in command of the government forces of Ecuador, was defeated, and, sick and wounded, made his way to the American legation. Minister Tillman, during the month preceding, had refused all applications for asylum, but upon the overthrow of the government and the abandonment by the administration of the public offices, his legation became full of men, women, and children, while the defeated general also found a refuge therein. His entire course was approved by Secretary Olney. He considered that the shelter given was not in the nature of an asylum; that when there is no government it is proper to protect lives from violence, but that upon the reestablishment of a central government it is no longer justifiable to afford refuge to those whom that government demands. "Asylum can find excuse only when tacitly invited and consented to." 34. On Feb. 3, 1896, Minister Smythe sent the following message: "Protection asked by a political suspect denounced by the government. To-day I ask the 'usual courtesy' to place him on some outgoing vessel." This was answered February 18th by Mr. Olney in the following caustic manner:—

"No right to protect such persons by harboring them or withdrawing them from the territorial jurisdiction of their sovereign is or can be claimed on behalf of the diplomatic agents of this government. . . . Your request for the 'usual courtesy' is not understood. . . . If the Haytien government should exercise its evident right to refuse you such permission, you would be placed in a wholly indefensible position. The 'usual courtesy' of which you speak appears to be only another name for the practice of that form of alien protection . . . which this government condemns. Whatever the result of your request, notify the refugee that you can no longer extend to him your personal hospitality."

35. The American legation in Ecuador in March, 1896, occupied but a part of a certain building,—the upper floors. One Colonel Hidalgo was concealed in the rear of the building, but outside of the part occupied by the minister. Finding that he could not escape, he requested Minister Tillman to tender his surrender upon promises of kind treatment and a fair trial. Mr. Olney said:—

“You are responsible only for such part of your premises as you may actually rent and occupy, and, while you will neither invite nor tolerate abuse of your individual habitation as a refuge for evil-doers or suspects, you cannot permit any inference that you are to be regarded as accountable with respect to the other part of the building.”

This statement following, as well as a repetition of the language used in 23, *supra*, was allowed by Secretary Olney to pass without comment:—

“Under international law, the legations are regarded as asylums for persons pursued by mob violence, but not for conspirators when they may be demanded by regular proceedings from proper officials.”

#### PRINCIPLES INVOLVED.

From a legal standpoint alone, omitting for the present all questions of humanity and of practical policy, there are two grounds upon which the practice of asylum has been sought to be justified: I. Extritoriality. II. Acquiescence and Usage.

##### I.

Secretary Bayard touches the heart of the whole matter when, in his letter of 1885, to Minister Scruggs, of Colombia, he states that the whole question of asylum has been much obscured by treating as a matter of fact a mere figure of speech.

From the earliest times it has been considered necessary to grant to an ambassador residing in a foreign state certain legal immunities. Accordingly he has been exempt from the operation of the local law as respects his person, his family, his suite, and, for the most part, as to his residence—this upon the two grounds of courtesy and convenience. To embrace within one general phrase the whole circle of his immunities, as well as to include the right contended for him of judicial control over his premises, and to emphasize the nationality of his children born while abroad, the term “extritoriality” came into use. By this figure of speech the idea became implanted that, although the minister selected his



domicile within foreign territory, yet by that selection his residence lost its former character and came *pro tempore* under the control of his sovereign as part of his territory. That this view involved but an imperfect conception of the true principles, and unwarrantably limited the idea of sovereignty of the accredited state over its own dominions, is to-day admitted, but with this comprehensive figure of speech taken as a basis, and accepted as a fact, it followed as a logical sequence that the minister's house could not be invaded by the government upon any pretext, any more than could the capital of the state from which he was sent. Consequently, if any one escaped to the asylum of the legation, it lay within the power of the ambassador, doing justice according to his own peculiar views, to say whether or not as a matter of courtesy (the courtesy thus became transferred to the wrong side of the account) he would surrender the refugee to the government from which he was fleeing, but he would admit of no right lying in the local government to demand the fugitive. The man was within the territory of a foreign power, over which the local jurisdiction, *a priori*, could not extend; and although the extreme absurdity of extradition was probably never claimed, yet, in some of the negotiations carried on between the countries from time to time involved, striking analogies to this process are to be found. This is the doctrine of asylum developed to its extreme limits.

Evidence of the presence of this idea in our diplomatic correspondence may be found in cases 3, 8 (wherein the French minister, M. de Lesseps, said that it was necessary "before all things to save the principles of inviolability and extraterritoriality"), 9, 19, 24, 28, 29, *supra*. In only one, *i. e.* 24, of these instances did it meet with the express disavowal of our government, although it is impossible, upon reading through our diplomatic correspondence in its entirety, to believe that the United States government sanctions, or ever has sanctioned, or even recognizes, the doctrine of extraterritoriality as thus applied. Our government holds that its ministers, their families, their suites, their servants, and their residences, are to be accorded all the rights of personal immunity that have been granted diplomatic representatives at all times, so far as may be necessary to their comfort and convenience, but this is a far different thing from saying that this immunity stretches to such an extent as to allow a minister to set up in the midst of another nation an independent sovereignty of his own which cannot be entered save by an unfriendly act. He may well be granted the privilege of seeing that justice is done upon those members of his

household, who by their official relation stand upon a similar basis with himself,—he may insist upon the prerogative of redress among them, perhaps; but this, too, is a far different thing from saying that a citizen of another country may, by simply passing the portals of his door, place himself in the same position as the *bona fide* members of his suite. Besides, good faith would seem to require that his household be kept above suspicion, and that it should at all times be open to the view of the accredited state; his tenure there is dependent upon the will of the sovereign to whom he is sent, and his rights rest, therefore, upon that sovereign's courtesy, not upon some quasi-temporary soil ownership. Personal immunity is too small a cloak to stretch over as a defence to shield from the operation of a local law a citizen of the country granting him this immunity. Simply stated, the idea is too broad; it takes too much as proved; the territory of the legation is not the territory of the legation-nation.

## II.

Premising, then, that there is no legal basis from principle to justify the doctrine of asylum, we come to consider the question of acquiescence and usage as affecting its practice. Thus: Minister Bassett speaks of the existence of the custom for seventy years in Hayti (case 19, 1875). The Minister of Brazil (case 7) states that the "right had been officially recognized and constantly respected by all the governments in Peru since its independence."

The usage seems to have grown up entirely in recognition of the instability of the various governments of the smaller American countries and the ardent vengeance with which each political suspect or revolutionist was hunted out when his faction was defeated. Some writer calls Peru "that classic country of revolution," and Mr. Seward speaks of the "chronic condition of rebellion" throughout Spanish America. In such a state of affairs it was no wonder that each ephemeral president and his cabinet felt a personal interest in maintaining a custom to the existence of which he might owe his life on the morrow. It was but natural that men should wish to preserve a retreat for themselves in such kaleidoscopic countries, where the conspirators of Monday might form the government of Tuesday, and the statesmen of the morning might be but outlaws in the afternoon. Thus we find (case 19) Minister Bassett stating: "The right of asylum has never been renounced by this government (Hayti), and it practically has refused to assent to its discontinuance. . . . The Haytien plenipotentiary would not agree

to having the exercise of this right taken away from even our consulates in the inferior ports." True, each government that happened to be in power for the time being would demand that any fugitives then in shelter should be surrendered, but it preferred always to predicate its request upon some ground which still recognized the existence of the custom, but contended that the present case was without the pale of its proper exercise.<sup>1</sup>

Thus it is that to-day, so far as now appears, there is but the one country of South America in which the custom is not recognized, *i. e.* Peru (case 8), while Great Britain has discarded the privilege with reference to its consular offices in Hayti.<sup>2</sup> The United States, "while discountenancing the custom, is indisposed to deny temporary shelter to any unfortunates threatened with mob violence"—an indisposition broad enough to protect almost any fugitive that may apply when fleeing as a political refugee.

Apart from questions of humanity, the chief basis of our attitude has been that this government wishes no "invidious distinction to be made against its ministers." (Case 29.) So Secretary Seward, May 1, 1868, "nor relinquished any sooner, nor in any greater degree than it is renounced by the legations of the other important neutral powers." Although Mr. Fish says inconsistently (in case 19), "The course of other states in receiving political refugees is not sufficient to sanction a similar step for us." And a few days later he blows cold again by saying, "We would prefer, therefore, not to formally assent . . . without ascertaining the views of other governments" <sup>3</sup>

We thus reach a conclusion that, owing to the long continuance of the custom and the acquiescence therein of the local governments, the nations of the world in general and the United States in particular, notwithstanding its qualified denunciation, while disavowing the usage in legal theory, will claim under certain conditions the quasi-right of being accorded the same privileges of asylum as have hitherto been granted in Central and South America. And until an express renunciation by the particular state in question, as by Peru in 1867, or a general agreement among the powers to cease the practice, the question is liable to repeatedly reappear in diplomatic correspondence.

Just what are those conditions under which the United States will again claim protection for refugees, and what the attitude of

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<sup>1</sup> As in cases 7, 19, 29, 32, and 35.

<sup>2</sup> *Cf.* Foreign Relations Reports, 1875, p. 682.

<sup>3</sup> Fish to Preston, case 19.

the government has been in the past, will more clearly appear by re-subdividing the cases cited into groups classified by some similar circumstances, and by first viewing the subject generally in the negative light of certain

#### LIMITATIONS.

In earlier times, the reverse of the present position was held in reference to the question, "Who may rightly seek the privilege of asylum?" Martens, in 1789,<sup>1</sup> declared that asylum was allowed for private crimes, but not for political refugees if their surrender were demanded. Vattel considered that it might be allowed to those who "often prove to be unfortunate rather than criminal," a status so difficult of ascertainment in the heat of the circumstances attending the request for asylum as to mean little unless it means political offenders. At any rate, to-day the privilege is confined to political refugees, and our state department entirely disavows any protection afforded to mere criminals.<sup>2</sup> . . . Just who are "criminals," however, and hence should be surrendered, has been a difficult nut to crack, and has been a matter of contention in some of the important cases (as in 9, 19, and 32). The government has apparently construed the question leniently, and has usually given the benefit of the doubt to the refugee, if the popular passion seemed great or the country in a general uproar. Such things have been left to the discretion of the minister upon the scene, who better could judge of the temper of the people and the real reason back of the demand for the fugitive; in all save (case 32) Minister Egan's second imbroglio. One can see in this latter decision a concession given to Chili to smooth the ruffled feathers of 1891. In this case the department seemed over-anxious to make the offenders out as criminals rather than outwitted politicians. They were indicted for "sedition, riot, insurrection, and mutiny." If this is a criminal charge it is rather equivocal, and has all the look of a mere political indictment.

The fact that a prior trial has been had and a conviction obtained for political wrong-doing before the refuge has been sought should be a reason for the surrender of the fugitive, since the custom has arisen mainly for that temporary protection until passion should subside and a fair hearing be granted. If that trial has been already had there seems no reason why this desideratum is

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<sup>1</sup> Polson, *Law of Nations*, sec. 32.

<sup>2</sup> See cases 7, 9, 17, 18, 19, 20, 23, and 32.

not already obtained. That a mere indictment had been had for prior criminal acts, although the refugees had been guilty of subsequent political offences, was considered sufficient reason for the surrender of the Chilian fugitives in case 32.<sup>1</sup> Quite different is the trial "par contumace" while the refugee is still under the legation roof, which appears in the extended reports of case 19. Mr. Moore<sup>2</sup> contends that such a proceeding is entirely warrantable, but in view of the fact that it is easily liable to abuse, the suspicion with which Minister Bassett looked upon the same doubtless justified our government in its refusal to surrender the refugees, upon the ground of their being proved enemies in a trial where they were not present to defend.<sup>3</sup>

An obvious limitation is that the right is confined to the premises of the legation itself. Boisrond Canal took refuge in the country home of Mr. Bassett, but since the minister was then occupying it as his personal residence, no question was raised. The continual annoyance in ceaseless shouting and the interruption of free passage which Mr. Bassett here suffered, as also Mr. Egan, in case 29, were unjustified, although they did take place beyond the bounds of the legation, in the streets and roads surrounding it. We were doubtless justified, despite Mr. Matta's reasoning, in treating these acts as wanton insults. As Mr. Egan tersely put it: "It is absurd to consider that the right of asylum should be made a mockery by converting the legation into a permanent prison." An unjustified use of his personal immunity was made by the Argentine minister in Colombia in 1885, in removing his effects to the home of the person sought to be arrested, and there protecting him. A legation can scarcely be the ambulatory thing he sought to make it. The Hidalgo matter in 1896 (35) shows the narrowness with which it is proper to construe the limits of the legation.

A considerable amount of the irritation in the two principal cases, 19 and 29, was caused by the belief of the local governments that the refugees were communicating with their partisans, and that the legation was thus but the centre and fountain-head of the opposing propaganda. There seems to have been no real ground for that belief in the Haytien matter, and little room for the same in the Chilian controversy, in view of the fact that several hundred police constantly patrolled the legation premises.

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<sup>1</sup> See, also, case 29, *semble*, as a reason for refusing safe-conducts.

<sup>2</sup> 7 P. S. Q. p. 229.

<sup>3</sup> Cf. also, Foreign Relations Reports, 1891.

So, also, it was claimed by the Haytien government that the refugees retained arms and ammunition in their possession, an allegation flatly denied by our minister, who stated the position of our government to be that it "would never tolerate any act of a hostile nature on the part of any refugee within the legation, while it is absurd to suppose that the official residence of the minister of a friendly foreign power is to be made an arsenal for the storing of arms and ammunition, or become the basis of operations against the existing government."

Another limitation ordinarily found in the granting of the privilege is that the minister furnishes upon request a list of the refugees. Such was the case in 9, 17, and 21. Minister Bassett's refusal in 1875 to do so seems entirely satisfactory, for the true basis for furnishing the list seems to be the one he gives, *i. e.* to facilitate the embarkation of the refugees. The granting of the list appears to be a manifest courtesy, but not a requisite, save in making out safe-conducts and in preparations for departure.

Having seen that both writers upon international law and governments at large discountenance any legal theory of asylum, and maintain it only in a certain limited sphere, upon limited conditions, and predicate their attitude then only upon past usage, we now look to see whether or not the policy of continuing the practice be not, like the theories that gave it birth, entirely fallacious.

"The practice of giving asylum has been and still is a prolific source of revolutions in and the instability of South American republics. The traitor feels assured that if he fails in his rebellion he has only to flee to the house of the minister, where he is protected with tender solicitude. Thus encouraged, he launches recklessly into his schemes, and the country is kept in continual commotion." (Minister Hovey, Peru, 1866.) "One of the greatest difficulties which a foreign minister has to meet here grows out of the mistaken notion that legations are 'cities of refuge' where every class of law-breakers is safe from arrest. So general is the misunderstanding that a thief or a deserter or an assassin considers himself safe if he can secure admission by force or fraud into a building occupied by a foreign minister." (Minister Tillman, Ecuador, 1896.)

These quotations show clearly the abuse to which the practice is liable and which seems its necessary adjunct, and, in confirmation thereof, may be stated again the cases of Boisrond Canal, three times a refugee, who returned as president three weeks after his embarkation from our legation, and those of Canseco in Peru and Granadas in Guatemala, each of whom owed his quickly subsequent

presidency to his timely American shelter. Every fact that appears in the reports bears out the statements cited above, and though the question is a complex one, it may well be doubted if the humanity which prompts the shelter of refugees is in the long run humanity at all, but is not rather the cause more than the subsequent of the turmoil of the Spanish states. It is scarcely to be denied that "the practice tends to the encouragement of offences for which asylum may be desired." Add to this the expense and trouble entailed upon the ministers in granting the privilege, and the constant irritation engendered whenever its exercise is called into play, and we may well question whether stability will not be fostered and justice better secured by leaving the states in question to work out their own salvation in their own way; to apply to the Spanish American states what a great writer on international law, Merlin, has stated in general: "What, then, is the proper way to end all disputes with regard to the right of asylum? It is to return to the general principle which we have laid down; it is to acknowledge positively that this so-called right is only an abuse, an outrage against the sovereign authority, and that no consideration should cause it to be tolerated;" or, as Phillimore has called it, "a monstrous and unnecessary abuse."

#### THE COURSE OF THE UNITED STATES GOVERNMENT.

While our government in several of its dispatches asserts that its course has been marked by consistency, it is warrantable to reach an opposite result by reading through its own utterances. While there runs through the instructions a certain similarity of phrase, yet we must conclude that the main end of the government has been to keep out of difficulties, and that it is impossible to tell in just what case a minister would be safe in granting the privilege, although he is yet not *forbidden* to do so by the tenor of his instructions. Nowhere is this more strikingly illustrated than in our attitude regarding *consular* protection. In cases 2, 4, 6 it was positively stated that no such usage existed, while in case 5 (six years previous to case 6) it was practically conceded that there was such a custom. In 1872 (case 14) cases 2, 4, and 6 were disregarded and 5 followed, and in the following year, case 15, the inference was that the department's wrath was roused not by the surrender of the fugitive, but by the violence of the entry. Case 21 inclines to the negative view of 6, and the department in its latest utterances, in 25 and 26, comes out unreservedly that *legations and consulates* stand on the same footing. How any claim

for consistency can be maintained in a record of this sort (no, no, yes, no, yes, no, no, yes, yes) is inconceivable.

It is only by dividing the cases into four groups that order can be found in the decisions made, although it is to be admitted that the general course has been to deprecate the practice.

### A.

#### CASES WHEREIN ASYLUM HAS BEEN REFUSED.<sup>1</sup>

In all of these instances save the last, the *Barrundia* episode, the government has unqualifiedly approved the action of the representatives of the United States in refusing asylum. The last-named case must stand upon precedent as a mistake of Mr. Blaine's, for it is the only case in the history of our diplomacy where a minister was censured after refusing shelter. Certain different questions of course arise, since the affair took place upon a vessel in harbor, but Mr. Blaine's whole argument is permeated with the view that "the abandonment of such a privilege" cannot be approved. He says nothing in regard to the discretion of the minister in such cases, which seems to be the keynote of the standing instruction to ministers as found in case 23. (For absolute contradiction *cf.* cases 28 and 34.)

### B.

#### CASES IN WHICH INSTRUCTIONS ARE ASKED AS TO FUTURE ASYLUM.

The real place to look for the policy of our government is in its instructions, based not upon a case then pending, but upon its directions for future guidance, since then the doctrine may be found untrammelled by any of the complications of an actual difficulty. The two earlier cases, 1, 6, are to the effect that asylum is improper if there be objection to its exercise. Then follows the long list of instances<sup>2</sup> which show the steady theoretical policy of the country (apart from the decision of actual cases) from 1868 to 1890. The meat of these instructions is that mentioned before (page 131):—

"While discountenancing the custom, the United States is indisposed from obvious motives of humanity to deny temporary shelter to any unfortunates threatened with mob violence."

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<sup>1</sup> These are cases 7, 8, 17, 18, 20, 30, 31, and 28.

<sup>2</sup> Cases 10, 11, 23, 24, 25, 26, 27.



The latest extended and crushing utterance on the subject, Mr. Olney's, case 34, can be reconciled with the foregoing by assuming that the state of public peace was tranquil at the time, *i. e.* that we are to put the emphasis on the word *mob* in the instructions quoted. He tells the minister that he has placed himself in an "entirely indefensible condition." Mr. Olney's savage rejoinder seems cruel when we find that one month later he tacitly recognizes the usage as existing in Ecuador.

## C.

We do not find unanimity in those cases wherein asylum has been granted, but slight difficulty has arisen, and the matter has been referred for comment. The general tendency has been in this situation to approve the action of the minister with instructions to "be more careful in the future," showing that we would prefer to be humane if we could do so without raising too much disturbance, but yet that we wish to keep ourselves free to disavow any act in the future or to justify a refusal to grant shelter.<sup>1</sup> There runs through these cases the general Christian idea of protection of life in times of passion and riot, or when the central government is paralyzed, the true limit of the "right." Of the cases 2, 4, 15, 21, 32, and 34, in which such granting of asylum was *condemned*, although the difficulty was but a minor one, 2, 4, 15, and 21 may be distinguished as being consular cases, in which the rule is now changed; 32, in that the government professed to be convinced that the men were criminals (this is the only instance in which men were actually turned out after having secured the asylum), and 34 upon the ground just pointed out.

## D.

The last division of cases, 19 and 29, deserves a separate classification only because of the great irritation under which they were decided. The matter of Boisrond Canal has been sufficiently commented upon before, and one is disposed to side throughout with Minister Bassett, to feel gratified that our government did not consent to the surrender of the refugee, and to feel disappointed that it was willing to state to the Haytien envoy that "Mr. Bassett has thought proper to take the responsibility of harboring the persons referred to contrary to the wishes of his own government. This act has not been approved by this department, as it is not

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<sup>1</sup> These are cases 3, 5, 9, 12, 13, 14, 16, 22, 33, and 35.

sanctioned by public law, though it is in conformity with precedents in that quarter."<sup>1</sup> Again our department says, "Although . . . you should not have received those persons, it was not deemed expedient to comply with his request" to set them at large.<sup>2</sup> The only reason that Mr. Bassett's action was not disavowed entirely was the feeling that we must support our minister, in so inflamed a state of public mind, "for the honor of the flag." It is difficult to see how Mr. Bassett's position could have been any different under the instructions given to him subsequent to the imbroglio, had he received them in advance. His course was justifiable under the circumstances. Quite different was the government treatment of Mr. Egan in Chili in case 29. Although he went out of his way in affording opportunities for gratuitous insults and friction, and placed his arguments upon the untenable ground of exterritoriality, yet he was sustained and soothed throughout. His one strong position, that of having afforded shelter to the adherents of the now dominant faction, gave him an additional strength with the state department, and while the exigencies of the situation possibly required that our government should act with a firm hand, it seems a matter of regret to the impartial observer that some of the strong language used upon Mr. Bassett could not have been exchanged for some of the considerateness shown Mr. Egan. The latter's statement that he had expended \$5000 in the entertainment of the Chilian fugitives sounds badly in an American ear.

HOW WILL ANY FUTURE DIFFICULTY BE DISPOSED OF?

Taking the strong denunciation of Mr. Olney as representing the present feeling, the following statements are possibly indicative of our future policy:—

(a) The United States refuses to recognize that there is any right of asylum by the law of nations.

(b) Yet, by long acquiescence and usage, in the countries of Spanish America, such a custom does exist.

(c) This government is unwilling, acting independently, to assent to its entire abolishment, but expects the same privileges, if demanded, that are accorded the other powers. However,—

(d) It believes that this custom, as practised in the past, is as bad in policy as it is erroneous in principle; that it tends to aggravate those conditions which called it into being; that it is subject

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<sup>1</sup> Foreign Relations Reports, 1875, p. 739.

<sup>2</sup> *Ib.*, p. 701.

to great abuse, which is apparently inseparable from its existence ; and that—

(e) Its use must be limited to very narrow conditions within the careful discretion of the representative of this government,

(f) While a refusal to exercise the privilege will never be looked upon with disfavor.

(g) It can be granted *only* in case (1) there is mob violence threatened and imminent, or (2) when the existing government has been overthrown and the local law has given way to license and riot ;

(h) And it can never be invoked to harbor criminals and offenders against the laws when demanded by regular proceedings from proper officials.

(i) Whenever the protection is granted, all munitions of war must be confiscated ; the refugees must be kept within the limits of the legation premises ; and all communication with outside parties must be strictly prohibited.

This seems to be about as far as it is possible to curtail the "right," or perhaps, until the civilization of the South American countries is farther advanced, about as far as is expedient. Within these narrow limits, if they are strictly adhered to, humanity and wisdom seem to have joined hands, and with a consistent course predicated upon the above gleaned principles, the so-called right of asylum should not in the future be the cause of any serious difficulty, although it is doubtful if it will for many years disappear entirely from the yearly records of the Department of State.

*Barry Gilbert.*

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JAMES HENRY FISHER, LL. B., 1898, died on May 3, 1901, at his home in Denver, Colorado. He was an editor of the Review, and the Recent Cases of Volume 11 owe much to his ability and industry. One of the youngest members of the class, he was at the same time a most energetic and enthusiastic student, being singularly gifted with mental alertness and quick comprehension. He engaged in law practice in New York City, but ill health soon caused him to return to Colorado. His qualities of character and mind won the esteem of all who knew him, and cause their deep regret at his early death.

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THE RIGHT OF A BELLIGERENT TO LEVY CONTRIBUTIONS AND REQUISITIONS. — Since, through the assessment of taxes and in other ways, the inhabitants of the territory of one belligerent can be made to contribute to the support of that belligerent in its military operations, the rule has become established that enemy character is determined by domicile, not by allegiance. *The Indian Chief*, 3 Rob. 12, 22; *Mrs. Alexander's Cotton*, 2 Wall. 404 (*semble*); *Haggerty's Case*, Moore, International Arbitrations, 2661, 2663. Hence a belligerent is required to show no more leniency toward foreigners in enemy territory than the laws of war require him to extend towards native inhabitants. Upon this ground the United States and Chilian Claims Commission has decided, in the case of *Prevost v. Chile*, that American citizens in Peru during the war between that country and Chile were entitled to no special privileges, and that, since one of the rights of a belligerent is to levy contributions and requisitions upon his

enemy, the respondent government is not required to make compensation for money and property thus taken from the claimants, as, without discrimination, from other inhabitants. The case seems to be the first in which the right to levy contributions and requisitions is considered, yet in deciding that such levies may be imposed upon resident aliens, as well as upon native inhabitants, the Commission is undoubtedly correct, and is supported by the position of the English government in refusing to press against Germany claims of British subjects similar to the claim dismissed in the principal case. Calvo, *Le Droit International*, §§ 2250-2252. The decision is also supported by usage among nations. Moreover, the failure in some modern wars to exercise this right to its full extent has not been regarded as the growth of even an implied recognition that the right no longer exists. Hall, *International Law*, 4th ed. 445. The practice of the Germans in France, where in six months the requisitions, in addition to large contributions, are estimated to have amounted to \$80,000,000, shows the extent to which the right may be stretched, and even such excessive practice has not led to a denial of the right to draw sustenance from the invaded country. 3 *Revue de Droit International*, 288, 331-337. The few writers who are opposed to the recognition of the right in question, base their objections upon the ground that the modern practice requiring the giving of receipts, or *bons de requisition*, implies a liability to make compensation. Receipts, however, serve merely as evidence of the amounts collected, and hence as a guide in making subsequent levies, to enable the government of the invaded country to reimburse its citizens, or to increase or diminish, according to which party is ultimately successful, the final indemnity to be paid. Hall, *ut supra*.

In addition to the privilege of a belligerent to cast the burden of the war upon the enemy (Vattel, *Law of Nations*, bk. iii. ch. ix. § 165), the continued recognition of the right in question is to be supported upon grounds of policy and of necessity. For it is not always possible to furnish supplies from the home country, and regulated seizure by the authorities is infinitely preferable to the vandalism and pillage certain to result, if soldiers are not supplied. The reasons are especially strong where territory is under the control of a military occupant, who so far replaces the former sovereign that he is responsible for the protection of life and property in the district under his control. It is just, as well as necessary, that the expenses incurred in thus maintaining order should be borne by the inhabitants of the occupied districts, in the same manner as these inhabitants contributed towards the expenses of the *de jure* government. Hence the occupant must have power to collect taxes, which commonly under such circumstances bear the name of contributions, or requisitions when imposed in kind. No greater liability for repayment should result than is ever borne by the sovereign, who imposes taxes for the public good. While, however, the exercise of the right, especially during military operations, may well be demoralizing, this result, in view of the practice during the century as well as of the practical unanimity among the authorities, is not sufficient, in the absence of an agreement among nations, to warrant a denial of the right to levy contributions and requisitions. The greatly increased expense and difficulty of carrying on a war is likely, moreover, to counterbalance the effect which the demoralizing influence might otherwise have, so that a more extensive exercise of the right in future wars is by no means improbable. Bonfilis, *Manuel de Droit International Public*, § 1208.

REVIVAL OF PRIOR WILL BY REVOCATION OF ONE SUBSEQUENT IN DATE. — There is much confusion in the law as to the exact effect of the destruction of a revoking will. The English common law, before the Wills Act, 1 Vict. c. 26, § 22, was based on the theory that all wills were ambulatory until the death of the testator, and that consequently a revocatory will, revoked by the testator during his lifetime, had no effect on the prior will. *Goodright v. Glasier*, 4 Ban. 2512. The ecclesiastical courts, however, inclined to a different doctrine, holding that the question of revival depended wholly on the intention of the testator manifested in the destruction of the later will. *Usticke v. Bawden*, 2 Add. Ecc. 116, 125. The Wills Act in 1837 may be said to have settled the law in England that there can be no revival without a republication. *Major v. Williams*, 3 Curt. Ecc. 432. But in America, where the Statute of Frauds is more generally adopted, and where the influence of the ecclesiastical courts has been strong, the decisions are arrayed on different sides of the question. Woerner on Administrations, § 52. In a recent Vermont case a testator made a second will inconsistent with his first one, though containing no express clause of revocation. He destroyed the second, later declaring to his son that he wanted the first to stand. On a careful review of the authorities, the court holds that the first will is revived, laying down the rule that no presumption arises from the mere act of destruction, but that the revival depends upon the intention of the testator. *In re Gould's Will*, 47 Atl. Rep. 1082. As to the question of presumption there is a hopeless conflict of authority. In some states mere destruction raises a presumption of revival, *Colvin v. Warford*, 20 Md. 357; while in others the destruction *ipso facto* does not revive the prior will. *Pickens v. Davis*, 134 Mass. 252. It is to be noted in the principal case that the second will was merely an implied revocation, and contained no express revocatory clause. A distinction has sometimes been taken on this ground, a revival being held possible in the former case, while impossible without a republication in the latter. *Cheever v. North*, 106 Mich. 390; *Scott v. Fink*, 45 Mich. 241. The distinction, however, it would seem, is untenable, as in general an inconsistent subsequent will has the same effect as one containing an express revocatory clause. On principle also, whether the revocation be express or implied, the mere destruction of the revoking will should raise a presumption of intestacy. If, as some courts maintain, a subsequent will revokes absolutely a prior will, it necessarily follows that there can be no revival without a republication. On the other hand, if according to the early English law the mere destruction *animo revocandi* of the second will leaves the prior will unaffected, it follows that the prior will must stand, even in cases where the testator may have intended to die intestate. Both these views tend to an undesirable result in not giving effect to the intent of the testator, and a *via media* accordingly is to be sought. The solution of the problem lies in a careful study of the act of revocation of the second will. The second will has two effects; it makes new provisions in regard to the property, and it conditionally revokes the prior will. When the second will is destroyed *animo revocandi*, the new provisions obviously are revoked, but it would seem that the revocation need not be considered as revoked unless the testator so intended. In other words, whether the destruction *animo revocandi* of the second will revokes the revocation contained in that will is a question of intent. It would seem, therefore, that the result reached in the principal case is correct. The court states, however, that the

mere act of destruction raises no presumption one way or the other. As the burden of proving the will is on the proponents, this appears in effect to be saying that there is a presumption of intestacy. The proponents have to show that the revocation has been revoked, and in order to do this they must prove, as has been suggested, some fact other than the mere destruction of the second will *animo revocandi*.

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THE LIABILITY OF TELEGRAPH COMPANIES TO AN ADDRESSEE. — There has been considerable conflict of opinion over the legal status of telegraph companies. In some jurisdictions they are treated as common carriers, while in others they are permitted to contract against liability for negligence. 15 HARVARD LAW REVIEW, 158. A difference of opinion exists also as to their relations to the sender of a message, some courts holding them to be his agents, *Western Union Tel. Co. v. Shotter*, 71 Ga. 760; others treating them as independent principals, *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030. The greatest diversity of opinion, however, has arisen where liability to the addressee has been brought into question, the cases falling into two classes; one, where there has been a failure or delay in delivery, the other, where there has been a mistake in the transmission. Although no case of the first class seems to have arisen in England, the English courts have denied a recovery in the second class on grounds that would preclude a recovery in the first. *Playford v. United Kingdom Tel. Co.*, L. R. 4 Q. B. 106. In this country, however, recovery has been given in both classes. The decisions in the second class may be supported as grounded in tort. 14 HARVARD LAW REVIEW, 193, note 1. The principle on which the addressee in the first class can recover is more obscure. A recent Texas decision, following the majority of American cases, bases his recovery on contractual grounds. *Western Union Tel. Co. v. Norris*, 60 S. W. Rep. 982. The addressee is commonly treated as beneficiary, and on the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, is allowed to sue in contract. *West v. Western Union Tel. Co.*, 39 Kan. 93. This doctrine, however, is itself anomalous, is repudiated in several jurisdictions, and is nowhere applied when the third party is merely incidentally benefited. 71 Amer. St. Rep. 176. Upon this last ground one court at least has refused to apply the doctrine in an action by the addressee, even though the message was one engaging his services. *Postal Telegraph Cable Co. v. Ford*, 117 Ala. 672. If this, then, be the true principle, it follows that the right of the addressee is much more qualified and restricted than has been supposed.

In analogy to a theory invoked to support *Lawrence v. Fox*, *supra*, it has been suggested that the sender makes the contract with the telegraph company as agent for a disclosed principal, the addressee. *De Rutte v. New York, etc., Tel. Co.*, 1 Daly, 547. Such a theory may be resorted to where the sender acts primarily in the interests of the addressee. In the ordinary case, however, where he acts for himself or for a third party, such an agency cannot be implied except as a legal fiction, unwarranted by the facts. *Postal Telegraph Cable Co. v. Ford*, *supra*.

Although, as has been pointed out, the addressee may recover in tort for negligent transmission, in the absence of statutory provision no decisions have been found allowing such an action for failure to deliver, and some courts expressly deny a tort liability in such cases. *Russell v.*

*Western Union Tel. Co.*, 57 Kan. 230. There are *dicta* that telegraph companies owe a duty to all persons beneficially interested in the transmission of the message, but these are negated by decisions holding that one in whose interest a telegram is sent cannot recover unless he is addressee or sender. *Western Union Tel. Co. v. Fore*, 26 S. W. Rep. 783 (Tex.). If the duty of telegraph companies faithfully to transmit messages extends to the addressees it would result in a liability which would be unique in the law of torts, and a liability denied in the analogous cases of common carriers, *Ogden v. Coddington*, 2 E. D. Smith's Rep. 317, 327. No satisfactory reason, therefore, has yet been found to support a recovery by the addressee of an undelivered telegram except in cases where an agency fairly can be implied from the facts, or where the doctrine of *Lawrence v. Fox*, with all its restrictions, can be invoked. The decisions in such states as Massachusetts, where *Lawrence v. Fox* is not followed, and New York, where it is greatly restricted, will be awaited with interest.

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MEASURE OF DAMAGES IN QUASI-CONTRACT. — Although express contracts and quasi-contracts are essentially different, courts have not been careful to keep them distinct, and, consequently, much confusion has resulted. This is very evident in the treatment of damages, as courts have often allowed these actions to run together at this point. In view of the similarity of cases arising in each form of action such a result is not remarkable. For instance, in a suit on an express contract, the defendant was very early allowed to show, in recoupment of damages, the amount he had suffered by a non-essential breach on the plaintiff's part. *Cutler v. Close*, 5 C. and P. 337. A similar case was one where the plaintiff, because of the non-performance of a condition precedent or a material breach, could not sue on his express contract, although he had furnished the defendant with some article of value. To avoid an unjust result, courts have allowed the plaintiff to recover in quasi-contract because of the unjust enrichment of the other party. In the average case, the fair value of the finished article was the contract price, and so the most expedient way of fixing the value ordinarily was to deduct from the contract price whatever was needed in order to finish the article according to specifications. *Kelley v. Town of Bradford*, 33 Vt. 35. This, it will be noted, was similar to the measure of damages in a contract action. However, in later cases in quasi-contract, the court, in adopting this method of assessing the amount, failed to notice that it was only a means to an end, that is, to find the value of the product. As a result the aim of the action was lost sight of, and in regard to the damages such cases were treated as if they were actions on express contracts. *Hayward v. Leonard*, 7 Pick. 181.

Because of this fact, a recent Massachusetts case is of value, not only for its accurate result but also for its sound reasoning. A plaintiff, unable to recover on an express building contract, sued in quasi-contract on the common counts. Soon after completion, the building became worthless, but the referee was unable to find whether the decrease in value was due to the plaintiff's breach or to other causes. The plaintiff claimed the contract price, deducting whatever damage the defendant could show was due to this breach. The court held, however, that as the plaintiff was entitled to recover only what the building was worth



to the defendant, the burden was on the plaintiff of showing that the loss was not due to him. *Gillis v. Cobe*, 59 N. E. Rep. 455. The decision is the more noteworthy, as it overrules an earlier Massachusetts case. *Hayward v. Leonard*, *supra*.

Although there are many *dicta* which support the plaintiff's contention, the result is justified by the principles which underlie the action. The builder is barred from any remedy on his contract and is seeking the aid of an action founded on the equitable rule that no one should be allowed to enrich himself at another's expense. *Britton v. Turner*, 6 N. H. 481. In such a case the contract is merely an incident. When the completed product is of no value to the defendant, the rule does not apply, and the plaintiff cannot recover for his labor. *Taft v. Inhabitants of Montague*, 14 Mass. 282. It is then obviously essential that he show a benefit to the defendant before he makes out even a *prima facie* cause of action. A hard case, of course, results when the article completed has little market value, although the cost of producing it is large, as, for instance, a building adapted only to one particular business. But if such a misfortune is to be avoided, it should be accomplished rather by relaxing the strictness of contract actions than by perverting the rules of quasi-contract.

**INJUNCTION AGAINST DIVORCE SUIT IN ANOTHER JURISDICTION.**—Although equity has not always asserted the power to interfere with suits in a foreign state, such a power has for some time been clearly recognized. *Lowe v. Baker*, Free. Ch. 125; *Lord Portarlington v. Soulby*, 3 Myl. & K. 104. If the suit has already been begun, an injunction can be obtained only under peculiar circumstances, which would make it highly unjust to allow its continuance. *Vail v. Knapp*, 49 Barb. 299. In a recent New Jersey case the defendant, a citizen of New Jersey, had begun an action for divorce in the courts of North Dakota. The wife, alleging that her husband's residence there was only colorable, and that he was about to practice a fraud upon the courts of that state, and upon herself, obtained an injunction against his proceeding further. *Kempson v. Kempson*, 58 N. J. Eq. 94. The issue of the injunction seems justifiable in view of the fact that the result of the foreign suit would in all probability, as was intended, be an avoidance of the laws of the parties' domicil. *Deshon v. Foster*, 4 Allen, 545. To compel the wife to undergo the difficulty and expense of fighting the action in a foreign jurisdiction would be highly unjust. *Kittle v. Kittle*, 8 Daly, 72. The injunction was properly served upon the defendant, who disregarded it, however, and obtained a final decree of divorce. He returned to New Jersey with a new wife, and was promptly committed for contempt. The Vice Chancellor then decreed a somewhat novel punishment; the defendant is fined, and is further to be imprisoned until he shall take proper proceedings to have the divorce decree set aside. *Kempson v. Kempson*, 48 Atl. Rep. 244 (N. J., Ch.). Upon an original application for an injunction to compel such proceedings the court would undoubtedly decline to interfere. This is not upon the ground that equity refuses to order a positive act to be done in a foreign jurisdiction, although intimations to that effect may be found. *Port Royal R. R. Co. v. Hammond*, 58 Ga. 523. The leading example of the exercise of such a power is *Penn. v. Lord Baltimore*, 1 Ves. Sen. 444. Equity will issue an injunction however only where the act to be performed

is simple and direct, and where the continued supervision of the court is not essential to its successful accomplishment. *Blanchard v. Detroit, etc., R. R. Co.*, 31 Mich. 43, 54. These considerations are not applicable, however, to the present case. The defendant is guilty of contempt, and the court may well impose what conditions it pleases upon his release. It remains for the defendant to show to the satisfaction of the court that he has properly performed them. See *People v. Rogers*, 2 Paige, 103; *Elizabethtown, etc., R. R. Co. v. Ashland, etc., Ry. Co.*, 94 Ky. 478. The position of the new wife presents some interesting problems, but seems properly not to have affected the question of the defendant's punishment for his contempt.

The recent decisions of the Supreme Court of the United States, affirming the unfavorable view taken by the New Jersey courts of divorces similar to that obtained by the defendant in this case, remove any doubt as to the practical justice of the present decision.

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PROPERTY EXEMPT FROM THE OPERATION OF THE STATUTE OF LIMITATIONS. — It has always been a doctrine of the common law that the Statute of Limitations does not run against the king. The basis of the rule is sound public policy, that the rights of the people should not be affected by the negligence of public officials. *United States v. Hoar*, 2 Mason, 311. Some doubt has arisen, however, as to the extent of the right. It is admitted that the Federal and the state governments are not affected by the running of the Statute, but there is a conflict as to whether municipalities are exempt. Some states hold that as a city is a compact body, and, therefore, as encroachments upon public rights are the more quickly observed and acted upon, there is no reason for exempting them. *City of Wheeling v. Campbell*, 12 W. Va. 36. But the weight of authority supports the view that as a city is a mere subdivision of the government in many respects, it should have all the protection that the other departments of the government enjoy. *Kopf v. Miller*, 101 Pa. St. 27; *Dillon, Municipal Corp.*, 4th ed., § 675.

A novel extension of this rule has recently been made by the California court. By virtue of an act of Congress, the plaintiff railroad was granted a right of way. Later the defendant entered into exclusive possession of an unused portion of this way and held it adversely for the statutory period. The court held that as the land belonging to the railroad had been set apart for public purposes, it was exempt from the running of the Statute. *Southern Pac. Co. v. Hyatt*, 64 Pac. Rep. 272. The language of the court treats this as a case where the land over which the railroad runs has been granted away from the government, but the facts are so meagrely reported that it is not wholly clear. If the fee is vested in the government, the decision is clearly right. *United States v. Hoar, supra*. If on the other hand the land has been granted away, the decision may well be doubted. In an earlier California case, the railroad recovered under similar circumstances, but the question of the Statute was not raised. *Southern Pac. Co. v. Burr*, 86 Cal. 279. Beyond this, there seems to be no decision in point. There are, it is true, cases holding that a citizen may obtain a right of way over railroad tracks by prescription. *Gay v. Boston & Albany R. R.*, 141 Mass. 407. These cases may however be distinguished on the ground that the presumption of a grant,

which the railroad is able to give, lies at the bottom of such prescriptive rights.

On principle, there seems to be no reason for exempting the railroad. Although it has many public duties to perform, yet it is strictly a private corporation formed by voluntary agreement, and operated for private gain. In no regard is it a public corporation. *Mt. Hope Cemetery Co. v. Boston*, 158 Mass. 509, 521. But more than that, the policy underlying the exemption does not apply. Government lands are so scattered that, with the best of officials, it is hard to keep track of them and to act promptly against adverse holders. But the land of a railroad is always within the easy reach and control of its officials, and the policy of the Statute of Limitations, that of quieting and securing titles, applies as strongly in their case as in any. As authority has not already extended the rule of exemption to railroad land, it is doubtful if the principal case will be followed.

CONTRACTS OF SEPARATION BETWEEN HUSBAND AND WIFE. — Decisions regarding the validity of separation agreements between husband and wife, being grounded on public policy, have in the past been almost as various as private opinions of what public policy should demand. England has at last adopted the liberal doctrine that agreements looking to an immediate or past separation are not only valid, but the mere promise to live apart forms good consideration and will be specifically enforced. *Besant v. Wood*, 12 Ch. Div. 605. In America the promise to live apart has been generally held contrary to public policy. Yet it has not invalidated a transaction having for its purpose an immediate separation or the continuance of one already consummated, as distinguished from one distant or contingent, provided there has appeared other good consideration. *Randell v. Randell*, 37 Mich. 563; *Hutton v. Hutton*, 3 Pa. St. 100. A recent case shows a tendency to make the American rule even more rigid. *Baum v. Baum*, 85 N. W. Rep. 122 (Wis.). The plaintiff agreed to live apart from her husband in consideration of his promise to assign to her certain life insurance policies. Upon the ground that all separation agreements are void unless the parties have already separated, it was held that the husband's promise could not be enforced. The decision might well be supported on the ground that the wife's only consideration was the void promise to live apart, but the contract was treated as the ordinary one for separation containing other good consideration. The English common law the court regarded as in accord with its view, until reversed during the present century. But although this idea is somewhat general, because it was the view of the ecclesiastical courts, the truth is that neither equity nor law regarded the condition of separation as voiding an otherwise valid agreement. *Gawden v. Draper*, 2 Vent. 217; *Rex v. Mead*, 1 Burr. 542; *Rodney v. Chambers*, 2 East 283. Owing to the wife's inability to contract in her own name such agreements were formerly carried out through the intervention of third parties. But this disability having been removed, she should be as competent as a stranger to enter into the agreement. *Sweet v. Sweet*, [1895] 1 Q. B. 12. The broad disapproval of contracts providing for an immediate separation, expressed by the court in the principal case, is, then, contrary both to the old common law and to the generally accepted American doctrine.

The general American view, admitting the validity of agreements con-

taining stipulations for separation, though such stipulations themselves are not enforceable, seems the wisest. As long as married people are allowed to live apart by mutual consent, it is a just rule which permits the husband to bind himself, in such circumstances, to support the wife. The law, to be sure, decrees and arranges for separation when it finds cause, but it must be admitted that the parties, if determined upon a separation, can in practice always show adequate cause, and that of this they are in truth the best and final judges. Therefore, when a separation is agreed upon, if it can be quietly arranged out of court, the results seem preferable to those necessarily attendant on the notoriety and scandal of a judicial separation. Public policy certainly demands that marriage itself be not so easily dissolved that it shall come to be lightly entered upon. But in giving effect to separation agreements between parties determined on living apart, the courts in no wise lighten the marriage bonds. They prohibit neither subsequent agreements to live together, nor do they go to the objectionable extreme of the English view by prohibiting attempts of one party to join the other, but merely make valid the husband's agreement to fulfil his marital duty of supporting his wife.

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REMEDIES FOR BREACH OF WARRANTY. — Two classes of remedies are almost universally granted in case of breach of warranty; one, in the nature of recoupment, by showing the inferiority of the goods in mitigation of damages, when suit is brought on the contract of sale, *Poulton v. Lattimore*, 9 B. & C. 259; the other, a recovery on the warranty itself, either in the form of an independent action, or by means of a counterclaim. *Mondel v. Steel*, 8 M. & W. 858; *Underwood v. Wolff*, 131 Ill. 425. As the latter remedy includes the former, recoupment is to-day of little practical value except in a few cases, where, through a technicality of pleading, the right to counterclaim has been lost.

A third remedy is available in some jurisdictions — the right to rescind if the goods prove inferior. *Bryant v. Isburgh*, 79 Mass. 607. This right is denied in the English courts and in many of the states. 14 HARVARD LAW REVIEW, 327, n. 3. The English rule is followed in a recent Connecticut case where a manufacturer, in fulfilment of an order, sold a machine of the description given, which failed to do properly the work for which it was constructed. *Worcester Manufacturing Co. v. Waterbury Brass Co.*, 48 Atl. Rep. 422. It was held that the delivery and acceptance of the machine constituted a waiver of any right to return the goods because of their inferior quality. Inasmuch as the defect in such a case is not discoverable until after delivery and acceptance, this is substantially a denial of the right to rescind.

The English rule is much confused by the distinction attempted between a condition and a warranty. A purchaser may regard a stipulation in a contract of sale as a condition, justifying rescission before he accepts the goods, but after acceptance he can treat the breach of the condition only as a breach of warranty, which is not sufficient ground for repudiating the contract. Sales of Goods Act, § 11, 5, 1. The theory is that after receipt of the goods the buyer, by retaining them, has derived some benefit, and cannot therefore restore the seller to his original position. *Street v. Blay*, 2 B. & Ad. 456. Such a tender regard for the seller, who has violated his contract by furnishing an inferior article, seems unjust.

As a matter of fact, moreover, the buyer fails to derive any appreciable benefit, and often, as in the principal case, suffers positive injury through unsuccessful attempts to utilize the article. It would therefore seem more just to hold that the buyer, who can discover the defect only on inspection after acceptance, should not by that acceptance forfeit his right to return the goods and be compelled to retain what must frequently prove to be an article useless for his purposes.

On strict legal theory, as well as on these practical grounds, the right of rescission should be granted. *Optenberg v. Skelton*, 85 N. W. Rep. 356 (Wis.). While the warranty in form is collateral, in its essence it is an important part of the contract and a material element of the consideration, for the failure of which the right of rescission should be allowed. It cannot properly be regarded therefore as waived by an acceptance, which is necessary for the purposes of inspection.

THE ADMISSIBILITY OF POST-TESTAMENTARY DECLARATIONS. — A recent decision by the United States Supreme Court is an important addition to the conflict as to when a testator's declarations will be admitted as evidence against the validity of an alleged will. A document was offered as a last will, and to show either forgery or revocation, the testator's unsworn declarations concerning the disposition of his property were offered by those who opposed its probate. The court held such evidence inadmissible unless made so near to the time of its execution as to be a part of the *res gesta*. *Throckmorton v. Holt*, 21 Sup. Ct. Rep. 474.

As far as the question of forgery is concerned the decision is in accord with the weight of authority. *Walton v. Kendrick*, 122 Mo. 504; *Gordon's Case*, 50 N. J. Eq. 397. In some jurisdictions, however, there is a tendency to admit such evidence under certain circumstances. For instance, in one state, it is admitted not as proof in itself of forgery, but as corroborative of other evidence. *Swope v. Donnelly*, 190 Pa. St. 417. In other states, it is admitted to show the state of feeling between the parties merely. *Johnson v. Brown*, 51 Texas, 65. These courts argue that this evidence, although dangerous, is often of great probative value and sometimes is the only evidence of the fraud. But this argument goes too far. These declarations come within the rule excluding hearsay, and our law of evidence begins only when we begin to exclude evidence which is logically relevant. The insuperable difficulty is that there is no recognized exception to the rule against hearsay which will cover the case.

With the question of revocation, however, there is more difficulty, as some late American decisions support the admissibility of such declarations for that purpose. *Lane v. Hill*, 68 N. H. 275; Steph. Dig. Ev., art. 29. These courts rely mainly upon a comparatively recent English case of very doubtful authority. *Sugden v. Lord St. Leonards*, L. R. 1 Pr. Div. 154. That case, which overruled earlier cases, has been looked upon with disfavor in its own jurisdiction. *Woodward v. Goulstone*, 11 App. Cases, 469. Moreover, at most, the case stands for this only, that such declarations may be used to corroborate other evidence as to the contents of a lost will. Granting its authority for that proposition, there is nothing to warrant the extension of that doctrine to cases similar to the principal case.

In one set of circumstances, however, a strong argument of admissi-

bility might be made. When an act of revocation is clearly proved, such declarations might be admitted to show the intent of revocation. It is the modern doctrine that where intent is material, contemporaneous declarations of intent are admissible. *Commonwealth v. Trefethen*, 157 Mass. 180. It might then be urged that at the time when they were made, the testator intended to dispose of his property in a manner inconsistent with the will. From this it might be possible to infer that when he did the act he had the requisite intent. To support this use, analogies might be drawn from the cases where a bankrupt's subsequent statements are used to show intent in an act of bankruptcy. *Rawson v. Haigh*, 9 J. B. Moore, 217. But it would require strong evidence to bridge over the time between the act and the declarations, and thus make the subsequent intent material. Even then it would be somewhat of a novel extension. But in the principal case, as there is no evidence that the testator did an act of revocation nor that his intent was continuous, the decision seems clearly right.

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#### COVENANTS AGAINST INCUMBRANCES RUNNING WITH THE LAND.—

The benefit of the old common law warranty ran to the heirs or subgrantees of the original feoffee. Holmes's Common Law, 375. When conveyances came to be made by force of the statute of uses, the common law warranty, applicable only to feoffments, became obsolete and covenants of right to convey, of seisin, and against incumbrances were introduced largely to take its place. Owing to the unfortunate wording of these covenants, a literal interpretation results in their being regarded as broken the moment they are given. By such a breach, they are prevented from running with the land for the benefit of heirs or remote grantees, and thus do not serve the purpose for which they were originally intended. In actions on the covenant against incumbrances it has been definitely decided that only nominal damages may be recovered until actual damages have been suffered. Therefore, provided an immediate breach is recognized, the disastrous result follows, that not only does the covenant against incumbrances fail to run for the benefit of grantees as in the case of the other covenants, but the Statute of Limitations may run against the claim before it is possible to recover more than nominal damages. As regards this covenant, therefore, the courts have made special efforts to obviate the foregoing consequences.

In England the courts adopted the doctrine that the breach of these covenants, although immediate, is continuing, and therefore its benefit runs with the land to subsequent holders. *Kingdon v. Nottle*, 4 M. & S. 53. However desirable the results, this reasoning is clearly indefensible. Discussion of its soundness has, however, been set at rest by a statute providing that all such covenants shall run with the land. In America it has been held in several jurisdictions that although the covenant is broken at once, thereby becoming a mere chose in action, yet this chose in action is impliedly assigned to all subsequent grantees. *Security Bank v. Holmes*, 68 N. W. 113 (Minn.); *contra*, *Kenny v. Norton*, 10 Heisk, 384 (Tenn.). The New York Court of Appeals, dealing with the question for the first time, has recently adopted this view in a strong dictum. *Geissler v. De Graaf*, 59 N. E. Rep. 993 (N. Y.). Although this implication of assignment is not unreasonable, it is obvious that the desired results are thus only partially obtained. The Statute of Limita-

tions still runs against the action; an heir can get no benefit, as the chose in action cannot be regarded as impliedly assigned to him; and the original grantee may release a covenantor who is without notice of the assignment, thus making a grantee's rights uncertain.

More satisfactory principles have been developed by most American courts which have decided the point. They have held that although there may technically be an immediate breach, no real breach exists until actual damages are suffered, so that, until such time, the statute does not run, and the covenant passes with the land, like the covenant for quiet enjoyment. *Richard v. Bent*, 59 Ill. 38; *Foote v. Corry*, 10 Ohio, 317; *Post v. Campan*, 42 Mich. 90. This view, which in effect regards the covenant as one purely for future indemnity, when made logically consistent by recognizing no immediate technical breach, seems clearly the best. All the desired results are thus obtained, and although the literal wording of the covenant is violated, yet in view of the facts that only indemnifying damages are allowed, that the covenant purports to be made with the covenantee, his heirs and assigns, and that its original purpose was solely to indemnify, the interpretation is readily defensible. This same doctrine ought properly to be applied to the covenants of right to convey and of seisin. Since however, in actions on these covenants, substantial damages may be recovered before they are actually sustained, the effect of an immediate breach has been less burdensome, and in consequence the decisions give less authority for holding such cases within the scope of the more liberal view.

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## RECENT CASES.

**AGENCY—COMMERCIAL TRAVELLER—AUTHORITY TO CONTRACT.**—*Held*, that in the absence of express authority to bind the principal, a commercial traveler can merely solicit and transmit orders, and the contract is not complete until the order is accepted by the principal. *John Matthews, etc., Co. v. Rens*, 61 S. W. Rep. 9 (Ky.).

The order solicited by the drummer has frequently been declared, as here, to be a mere offer, requiring acceptance by the principal to complete the contract. *Burbank v. McDuffee*, 65 Me. 135; *McKindly v. Dunham*, 55 Wis. 515, 518. The proper rule of law in such cases, however, is the ordinary rule of agency, that unless the act is authorized the agent cannot make a contract binding his principal; but such authorization may be either express or implied, and its extent is in each case a question for the jury. *Finch v. Mansfield*, 97 Mass. 89. It is doubtless generally the fact that there is no authority to bind the principal, but deciding such matters as questions of law leads to objectionable results. For example, a local custom giving agents greater authority than usual was held invalid on the ground that it was inconsistent with what had been declared to be a rule of law. *Higgins v. Moore*, 34 N. Y. 417. While the result reached in the principal case is doubtless satisfactory as a matter of fact, the proposition stated as a rule of law, though supported by authority, must be regarded as unsound.

**BANKRUPTCY—MINING CORPORATIONS—INVOLUNTARY BANKRUPTCY.**—The Bankruptcy Act of 1898, § 4 b, provides that "any corporation engaged principally in manufacturing, trading . . . or mercantile pursuits . . . may be adjudged an involuntary bankrupt." *Held*, that under the above section, a corporation engaged in coal-mining is not liable to involuntary bankruptcy. *In re Woodside Coal Co.*, 3 N. B. N. Rep. 336 (Dist. Ct., E. D. Pa.).

A coal-mining corporation, as lessee of mining lands, paid the owner of the lands a certain sum per ton for coal mined, and also sold supplies to its workmen. *Held*,

that under § 4 *b* of the Bankruptcy Act, the corporation is liable to involuntary bankruptcy. *In re Keystone Coal Co.*, 3 N. B. N. Rep. 349 (Dist. Ct., W. D. Pa.).

In the absence of judicial construction, § 4 *b* of the Bankruptcy Act would hardly include mining corporations, even when, as often happens, such corporations, in connection with mining, engage in operations allied to trade or to manufacture. *LOWELL, BANKR.*, 356. The word "traders" in bankruptcy statutes has usually been held not to include mine-operators. *Ex parte Schomberg*, L. R. 10 Ch. 172. The same result has been reached although the operator furnished supplies to his workmen. *Ex parte Gallimore*, 2 Rose, 424. "Mercantile" seems not to extend the meaning of "trading" in this direction. "Manufacturing corporations," although apparently a new definition in bankruptcy law, has been held, under state taxation statutes, not to include mining corporations. *Byers v. Franklin Coal Co.*, 106 Mass. 131. The decision in *In re Woodside Coal Co.*, *supra*, is therefore apparently correct under the Act, however undesirable its result, and is in accord with earlier decisions under the present law. *In re Chicago-Joplin, etc., Co.*, 104 Fed. Rep. 67. See 14 HARV. LAW REV. 298. As it is probably advisable to place in one class all corporations engaged principally in mining, the distinction suggested in *In re Keystone Coal Co.*, *supra*, between corporations working leased lands and others, would seem undesirable, besides finding no support in the Act.

**BANKRUPTCY — STATE EXEMPTION LAWS — WAIVER OF EXEMPTIONS.** — Under the exemption laws of Georgia a debtor had waived certain rights to exemption in favor of particular creditors. The debtor becoming bankrupt, the trustees set apart to him certain property as exempt, whereupon these creditors petitioned that the bankrupt's discharge be withheld until they could enforce their rights under the waivers, either in the state courts or in the court of bankruptcy. *Held*, that the petition cannot be granted. *Woodruff v. Cheeves*, 105 Fed. Rep. 601 (C. C. A., Fifth Circ.).

By the Bankruptcy Act of 1898, §§ 6 *a*, 70 *a*, state exemption laws are still in force, and the title to exempt property remains in the bankrupt. As waivers of exemptions usually create no lien, their holders may prove their claims in bankruptcy and will be barred by the discharge. *BANKR. ACT* of 1898, § 17 *a*. If, then, property in which exemption rights have been waived is held, as in the principal case, to be exempt under the Act, the bankrupt receives it free and clear, and waiver of exemptions, provided for by state laws, is virtually abolished. *In re Black*, 4 Am. Bank. Rep. 776; *In re Woodruff*, 96 Fed. Rep. 317. To avoid this difficulty by withholding the discharge, after delivering the property to the bankrupt as exempt, until creditors holding waivers reach the property through the state courts, appears contrary to the express words of the statute. *BANKR. ACT* of 1898, § 14 *b*. The proper solution seems to be to allow the trustee to take such property as not exempt. *In re Sisler*, 96 Fed. Rep. 402. Apparently the bankruptcy courts have power to administer it for creditors holding waivers. *In re Garden*, 93 Fed. Rep. 423; *In re Sisler*, *supra*. The principal case is supported, however, by several earlier decisions under the Act. *In re Camp*, 91 Fed. Rep. 745; *In re Hill*, 96 Fed. Rep. 185. Nevertheless it seems incorrect and ought not to be followed.

**BILLS AND NOTES — CHECK PROCURED BY FRAUD — LIABILITY OF DRAWEE.** — The Negotiable Instruments Act provides that no right can be acquired under a signature made without the authority of the person whose signature it purports to be, "unless the party against whom it is sought to enforce such right is precluded from setting up the . . . want of authority." *R. I. PUB. LAWS* of 1899, c. 674, § 31. A, representing himself as B, called upon C and induced the latter to draw for him a check payable to the order of B. A indorsed in the name of B and the bank paid the indorsee. *Held*, that the bank is liable to C for the sum paid, both at common law and under the Negotiable Instruments Act. *Tolman v. American Nat. Bank*, 48 Atl. Rep. 480 (R. I.).

If A, representing himself as B's agent, procures an instrument payable to B, obviously the drawer intends neither to make A payee nor to authorize him to indorse. *Rogers v. Ware*, 2 Neb. 29. But if A, representing himself as B, obtains an instrument payable to B, the drawer fairly intends that the person before him shall be the payee, although he erroneously supposes that this person is B. See 14 HARV. LAW REV. 60. In the present case therefore, apart from statute, the bank, having followed the directions of the drawer, should not be liable to him. *Land, etc., Co. v. Northwestern Nat. Bank*, 196 Pa. St. 230. The point does not seem to have arisen before under the Negotiable Instruments Act, and no decision at common law has been found



in accord with the principal case. Moreover under the English Bills of Exchange Act, apparently the bank would be protected. See *Clutton v. Attenborough*, [1897] App. Cas. 90. Finally, the Negotiable Instruments Act hardly compels the result reached, for although the bank relies upon an indorsement made without the authority of the person whose signature it purports to be, yet, as that indorsement accorded with the intentions of the drawer, he ought to be precluded from setting up the want of authority.

**BILLS AND NOTES—PURCHASER FOR VALUE—AMOUNT OF RECOVERY.**—A note having been procured by fraud, a purchaser for value without notice before maturity sued the maker on the note. *Held*, that only the amount paid by the plaintiff for the note, with interest, can be recovered. *People's Nat. Bank v. Mulkey*, 61 S. W. Rep. 528 (Tex., Civ. App.).

There is some authority supporting the proposition of this case. *Huff v. Wagner*, 63 Barb. 215. The sounder view, which seems at least equally well supported by authority, is that the holder should recover the face value of the note, and that the amount paid for it is material only as evidence on the question of *bona fides*. *Lay v. Wissman*, 36 Iowa 305. The suit is brought on the express promise contained in the note, to which the plaintiff has legal title, and therefore the amount recovered should be the face value, unless the maker has an equitable defence. If he has such a defence the purchaser is not holding free from equities, and the fundamental principle is violated that a purchaser for value without notice takes free and clear from all equities. *Kitchen v. Loudenback*, 48 Ohio St. 177. Moreover the rule in the principal case is objectionable on account of the inconvenience and confusion in commercial dealings which would result. *Cromwell v. County of Sac*, 96 U. S. 51.

**CONTRACTS—CONDITIONS—DEFENCE OF PLAINTIFF'S NON-PERFORMANCE.**—The defendants agreed to employ the plaintiff for a certain period, and the plaintiff agreed to perform his work in a manner satisfactory to the defendants. *Held*, that the defendants might discharge the plaintiff before the expiration of the term if the work was not absolutely satisfactory to them. *Gwynne v. Hitchner*, 48 Atl. Rep. 571 (N. J., Sup. Ct.).

It is of vital importance to determine in a contract whether either promise is made an express condition. If so, then, according to the general doctrine that an express condition must be exactly performed, any breach of that promise will necessarily be fatal to a recovery against the other party. *Kelly v. Sun Fire Office*, 141 Pa. St. 10. If the promise is not an express condition, the question is whether there has been substantial performance. LANG., SUM. CONT., §§ 157-161. If the breach is only a slight one, the other party must perform on his part and seek his remedy in damages. *Norrington v. Wright*, 115 U. S. 188; *King Philip Mills v. Slater*, 12 R. I. 82. Apparently in the principal case the plaintiff's promise was not an express condition, but the court seems to have overlooked the importance of that question. The case should have turned on the materiality of the breach, and the determination of that question should have been left to the jury.

**CONTRACTS—HUSBAND AND WIFE—SEPARATION AGREEMENTS.**—In consideration of the plaintiff's promise to live apart from the defendant, her husband, the latter promised to assign certain life insurance policies to her. *Held*, that the contract is void as against public policy. *Baum v. Baum*, 85 N. W. Rep. 122 (Wis.). See NOTES, p. 147.

**CONTRACTS—REPUDIATION—ANTICIPATORY BREACH.**—The defendant contracted to leave by will a certain share of his property to the plaintiff, in consideration of the latter's agreement to work for the defendant without recompense until twenty-one years of age. After the plaintiff had fully performed, the defendant asserted that he would not carry out his promise. *Held*, that the plaintiff has no present right of action, as the defendant may later elect to perform. *Pittman v. Pittman*, 61 S. W. Rep. 461 (Ky.).

The doctrine of anticipatory breach has been definitively accepted by the English and by most of the American courts. *Synge v. Synge*, [1894] 1 Q. B. 466; *Roehm v. Horst*, 178 U. S. 1. The hardship imposed on a plaintiff by the supposed necessity of continuing an otherwise useless performance, in order to put himself in a position to sue on his contract when the time for its performance by the defendant shall arrive, has been held to justify the doctrine. This reasoning assumes that the defendant's repudiation would not prevent his relying on a resulting non-performance

on the plaintiff's part as an answer to the plaintiff's action. It has been suggested that where, as in the principal case, a contract has been fully performed on the plaintiff's part before repudiation, the case does not fall within the reason for the rule. *Roehm v. Horst, supra*. But except in cases where the defendant's obligation is merely to pay money, the plaintiff would generally be obliged, in order to protect himself, to make other contracts, which would usually render it inconvenient to accept the defendant's performance. In justice, therefore, the plaintiff ought to have a right, without losing his cause of action against the defendant, to refuse acceptance in case the latter should change his mind and offer to perform. But if the defendant's repudiation does not prevent his setting up a resulting non-performance on the plaintiff's part, it would not prevent his setting up a resulting unwillingness to accept, and so defeating the plaintiff's cause of action. Convenience, which is held to justify the anticipatory breach doctrine in the case of contracts still executory, would equally justify the application of the doctrine in most cases where the plaintiff has fully performed. As these cases, therefore, cannot as a class constitute a proper exception to the general doctrine, and as no other exception has ever been suggested which would include the principal case, the decision must be regarded as altogether inconsistent with the prevailing rule.

**CONTRACTS—SPECIFIC PERFORMANCE—BUILDING CONTRACT.**—The plaintiffs, in pursuance of a scheme of street improvement, sold and conveyed a plot of land to the defendant, who covenanted to erect buildings thereon in accordance with certain specified plans. *Held*, that specific performance of the defendant's promise will be ordered. *Mayor, etc., of Wolverhampton v. Emmons*, [1901] 1 Q. B. 515 (C. A.).

As a general rule, specific performance of a building contract will not be enforced, the courts thinking the remedy at law to be usually adequate, and being impressed by the difficulty of supervising the performance. *The South Wales Ry. Co. v. Wyther*, 1 K. & J. 186. In England, however, there is a well established exception, when it appears that the defendant has by the contract obtained from the plaintiff the land on which the work is to be done, that the work is accurately defined, and that the plaintiff has a material interest in its execution, for which damages would not be adequate compensation. *FRY, SP. PER.*, § 103; *Storer v. Great Western Ry. Co.*, 2 Y. & C. Ch. 48. In the United States the rule is in general the same. *Gregory v. Ingwersen*, 32 N. J. Eq. 199. *Cf. Ross v. Union Pacific Ry. Co.*, 1 Woolw. (Circ. Ct.) 26. The principal case seems from the facts reported to fall within the exception as stated, and is therefore sound according to English and American authority.

**CONTRACTS—STATUTE OF FRAUDS—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR.**—A turnpike company orally agreed to exempt the occupants of a certain farm, for all time, from liability to pay tolls. *Held*, that this contract did not come within the section of the Statute of Frauds relating to agreements not to be performed within one year. *Great Western Turnpike Co. v. Shafer*, 57 N. Y. App. Div. 331.

When a contract does not fix the time for performance, any possibility in the natural course of events of full performance within a year is sufficient to avoid this section of the statute. *Clark v. Pendleton*, 20 Conn. 495. This includes cases where the time for performance is expressly or impliedly made dependent on length of life. *Fenton v. Emblers*, 3 Burr. 1278. But when the contract by its express terms is to require more than a year for complete performance, the statute clearly applies. *Boydell v. Drummond*, 11 East, 142. In several cases of this latter class however, in which on a certain contingency, such as the death of a person concerned, the contractor's liability might in fact cease within a year, courts have held that the statute did not apply. *Doyle v. Dixon*, 97 Mass. 208. But under such circumstances it seems rather that further performance is excused on the ground of impossibility than that performance is then completed, and the statute should be held to apply. *Dobson v. Collis*, 1 H. & N. 81. In the principal case, where the exemption was expressly for all time, any such contingency as the dissolution of the corporation within a year would not make performance complete, but would simply make future breach impossible. Therefore the decision seems wrong.

**CRIMINAL LAW—FORMER JEOPARDY—CONTINUOUS OFFENCE.**—The defendant kept a gambling room for a continuous period of time. Two indictments were found against him covering different portions of this period. *Held*, that a conviction on one indictment is a bar to a prosecution on the other. *Cawein v. Commonwealth*, 61 S. W. Rep. 275 (Ky.).

The court proceeds upon the theory that there is but one continuous offence up to the date of the finding of the indictments, and that the state, like the plaintiff in a civil case, is not allowed to split up one cause of action. Clearly if the state indicted at the end of each day, the statutory penalty might be imposed for each day's offence. It is difficult to see why by lapse of time offences once distinct should become inseparable, so that only one penalty can be imposed. The result is that one committing the crime for a long space of time before prosecution can be punished no more severely than one who engages in the criminal occupation for a day, though the former has done a much greater wrong to the state. The analogy of civil cases does not apply. There the total recovery of the plaintiff is not diminished by the operation of the rule, whereas here the total amount of punishment imposed depends entirely on the number of actions brought. The authorities on the point are squarely in conflict. See in accord with the principal case, *In re Snow*, 120 U. S. 274; *State v. Lindley*, 14 Ind. 430; *contra*, *Commonwealth v. Connors*, 116 Mass. 35; *People v. Sinell*, 131 N. Y. 571. The rule of the latter cases seems preferable.

**CRIMINAL LAW — HOMICIDE — PREVENTION OF FELONY.**—The defendant saw his brother and the deceased fighting, and shot the latter. He defended on the ground of imminent peril to his brother, who, it appeared, provoked the fight, although it was not shown that the defendant knew this. *Held*, that since the defence relied on would not have been available to his brother, the defendant cannot take advantage of it. *Wood v. State*, 29 So. Rep. 557 (Ala.).

It is well settled that one may interfere, even to the taking of life if necessary, to prevent a violent felony. *Regina v. Rose*, 15 Cox C. C. 540. Moreover, if one acts properly under the circumstances as they reasonably appear to him at the time, he is guilty of no crime. *Levett's Case*, Cro. Car. 538; *Commonwealth v. Power*, 48 Mass. 556. Consequently, the fact that the deceased would have committed no felony in killing his antagonist, if not then known to the defendant, is immaterial. In each case it is a question of fact what the defendant did reasonably believe, and unless the court is prepared to rule that on the evidence stated no one in the defendant's position could reasonably have believed that what the deceased was apparently about to do would constitute a felony, the decision can hardly be supported.

**EQUITY — INJUNCTION AGAINST PROSECUTION OF SUIT — CONTEMPT.**—The defendant, in violation of an injunction issued by the New Jersey Court of Chancery against the further prosecution of his action for divorce in North Dakota, obtained a decree in that action against the present plaintiff. *Held*, that the defendant must pay a fine for his contempt, and be imprisoned until he takes proper proceedings to have the divorce set aside. *Kempson v. Kempson*, 48 Atl. Rep. 244 (N. J., Ch.). See NOTES, p. 145.

**EVIDENCE — ADMISSIBILITY OF CONFESSIONS — COURT AND JURY.**—*Held*, that where there is conflicting evidence as to the voluntary character of a confession, the question of its admissibility is for the jury under proper instructions. *State v. Moore*, 61 S. W. Rep. 199 (Mo.).

The decision is in accord with the practice in many jurisdictions of leaving to the jury the question of the voluntary character of a confession, with instructions to disregard it if made under improper circumstances. *Burdge v. State*, 53 Oh. St. 512. This practice is at variance with the elementary principle that all questions whether of law or of fact relating to the admissibility of evidence are for the court alone. *Bartlett v. Smith*, 11 M. & W. 483. The burden of showing the voluntary nature of the confession would seem to be upon the prosecution. *Regina v. Thompson*, [1893] 2 Q. B. 12; *contra*, *Rufer v. State*, 25 Oh. St. 464 (*semble*). Accordingly, unless the court is satisfied that the confession was made under proper conditions, it should not be allowed to go to the jury. *State v. Andrew*, Phillips (N. C.) 205. The duty of the jury to consider the surrounding circumstances in determining the probative value of the confession when admitted, is a matter entirely distinct from the right of the prisoner that only evidence that is legally admissible shall be adduced against him. *Brown v. State*, 71 Ind. 470. The decision seems wrong on principle, and prejudicial to the prisoner in its effect, for a confession once admitted, even though found to be involuntary, can hardly fail to exert some influence upon the minds of the jurors.

**EVIDENCE — CRIMINAL LAW — ADMISSION BY CONDUCT.**—In a trial for murder, evidence was admitted that half an hour after the shooting occurred, and before the

dying man was conscious of impending death, he accused the prisoner of shooting him for nothing, and that the prisoner denied it. *Held*, that since the evidence could not come in as a dying declaration, nor as a part of the *res gesta*, it was not admissible. *Brown v. State*, 29 So. Rep. 519 (Miss.).

This ruling is directly in accord with one lately made by a Massachusetts Superior Court in the Eastman trial, and seems correct. When statements are made in the presence of a party to the litigation, and his answer, or failure to answer, supplies a fair inference of the truth of what was said, the statements and the manner of their reception may be shown in evidence. *Commonwealth v. Brown*, 121 Mass. 69. But the question whether such statements, by themselves inadmissible as hearsay, form in connection with the defendant's conduct, a basis for inferring an admission, so as to be competent on that ground, is a question for the court. Therefore, when acquiescence cannot fairly be found from the defendant's silence, or from his answer, when one is made, the evidence is properly excluded. *Moore v. Smith*, 14 Serg. & R. (Pa.) 388; *Mattocks v. Lyman*, 16 Vt. 113. English cases have held that whenever the statements are answered the evidence is admissible. *Rees v. Edmunds*, 6 C. & P. 164. But the English judges may charge on the weight of the evidence, and thus they reach almost the same results as would be reached under the doctrine contended for above. *Jones v. Morrell*, 1 C. & K. 266. In the principal case an admission of guilt could not possibly be inferred from the reply; and the evidence was therefore properly rejected. Moreover, the fact that the jury would be almost sure to misuse the evidence would incline the court to a strict observance of the rules of exclusion.

**EVIDENCE — HEARSAY — POST-TESTAMENTARY DECLARATIONS.** — The post-testamentary declarations of a testator were offered as evidence against the validity of an alleged will. *Held*, that such evidence is inadmissible unless part of the *res gesta*. *Throckmorton v. Holt*, 21 Sup. Ct. Rep. 474. See NOTES, p. 149.

**EVIDENCE — REAL EVIDENCE — PROOF OF AGE.** — In an action for personal injuries, there being no evidence of the plaintiff's age except his personal appearance before the jury, the lower court charged that his age should be considered in estimating the damages. *Held*, that the charge was erroneous for want of evidence upon which to base it. *Phelps v. Salisbury*, 61 S. W. Rep. 582 (Mo.).

As early as 1219 are found instances of the determination of age by the inspection of the court. BRACTON'S NOTE-BOOK, ii., Case 46. By the almost unanimous concurrence of modern decisions it is established that the age of one alleged to be an infant, or under the criminal age, or below the age of consent, may be determined by the jury on the basis of the person's appearance, though no other evidence is introduced. *Commonwealth v. Emmons*, 98 Mass. 6; *State v. Arnold*, 13 Ired. (N. C.) 184. So it may be decided whether or not a plaintiff is an old man. *Bertram v. People's Ry. Co.*, 154 Mo. 639. Even the competency of an employee or a defendant's sanity may be judged by inspection without more. *Keith v. New Haven, etc., R. R. Co.*, 140 Mass. 175; *Queen v. Goode*, 7 A. & E. 536. In the principal case the jury was not called upon to form any accurate judgment as to the plaintiff's age, but merely to come to some approximate conclusion as indicating his future prospects. For this purpose his personal appearance furnished sufficient evidence. The case cannot be distinguished from those cited, and the decision is opposed to the great weight of authority.

**PLEADING — GENERAL ALLEGATION OF FRAUD — CONCLUSION OF LAW.** — *Held*, that a general averment of fraud is sufficient on demurrer. *Fivey v. Pennsylvania R. R. Co.*, 48 Atl. Rep. 553 (N. J., Sup. Ct.).

A conclusion that certain facts constitute fraud necessarily involves the application to those facts of a rule of law. It follows that a general allegation of fraud is a statement of a conclusion of law and not an averment of fact. According to the well settled rule of the common law, conclusions of law are immaterial allegations in the pleadings and must upon demurrer be disregarded. Some authority is to be found in support of the principal case. *Christmas v. Russell*, 5 Wall. 290, 303. But by the great majority of decisions it is held that when fraud is relied upon the facts must be fully pleaded. *Cohn v. Goldman*, 76 N. Y. 284; *Wallingford v. Mutual, etc., Soc.*, L. R. 5 App. Cas. 685; STORY, EQ. PL., 10th ed., § 251. Similarly a general allegation of negligence is insufficient. *Griggs v. St. Paul*, 9 Minn. 246. The rule of the principal case sacrifices one of the essential objects of pleading, namely, to apprise the court and the opposite party of the facts intended to be relied on. Moreover it becomes

impossible to settle the case upon demurrer, although if the facts were stated it might appear that they were insufficient in law to support the plea. It would seem better to adhere to the well established rule that pleadings must state facts and not legal conclusions.

**PLEADING — THEFT — MONEY.** — *Held*, that under an information for theft, describing the property stolen as "lawful money of the United States," proof of a theft of silver certificates or national bank notes was a variance. *Perry v. State*, 61 S. W. Rep. 400 (Tex., Cr. App.).

The term "money," when employed in ordinary business transactions, is understood to mean any currency, including bank notes and any other circulating medium in general use as the representative of value. It has been held in a civil action, however, that treasury notes were not to be considered as money. *Foguet v. Hoadley*, 3 Conn. 534. But in general, unless specifically objected to when offered, silver certificates and bank notes are legal tender as money. *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333, 347. In criminal courts, however, where accurate specification is required, the term has been narrowly construed, sometimes as including merely coin, and frequently as including only legal tender in its strict meaning. *Pryor v. Commonwealth*, 2 Dana (Ky.) 298; *Hamilton v. State*, 60 Ind. 193; *Lewis v. State*, 28 Tex. App. 140. The broader interpretation in use in civil cases has been extended to indictments in some jurisdictions. *Commonwealth v. Lincoln*, 93 Mass. 233. No actual benefit comes to any one by requiring a particular description, since the only result is a long and useless enumeration of all kinds of money. The highly technical rule of the principal case, though firmly established in many jurisdictions, is therefore undesirable.

**PROPERTY — COVENANT AGAINST INCUMBRANCES — REMOTE GRANTEE.** — *Held*, that a covenant against incumbrances is broken, if at all, as soon as made, thus becoming a chose in action which does not run with the land; but that this chose in action is impliedly assigned to every subsequent grantee until substantial damages have been suffered. *Geisler v. De Graaf*, 59 N. E. Rep. 993 (N. Y.). See NOTES, p. 150.

**PROPERTY — PAROL GIFT OF LAND — DEDICATION.** — F promised his neighbors to give land for a schoolhouse site, and they erected a schoolhouse thereon, which subsequently came under the charge of the defendant school district. *Held*, that there was a contract by F with his neighbors to convey the land on the erection of a schoolhouse, that the acts done in pursuance of the contract took it out of the Statute of Frauds, and that therefore the school district had a right to the possession of the land. *Greenwood v. School Dist. No. 4*, 85 N. W. Rep. 241 (Mich.).

There are many cases wherein specific performance of a promise to give land has been decreed in favor of a promisee in possession who has made valuable improvements, although it is difficult to find any evidence of consideration. *Ungley v. Ungley*, L. R. 4 Ch. D. 73; *Freeman v. Freeman*, 43 N. Y. 34. These cases apparently make no distinction between a contract and a gift on condition. *Neale v. Neale*, 9 Wall. 1. In reality they can hardly be distinguished from other cases in which a licensee under similar circumstances is not protected. *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 51 Minn. 304. In the principal case the fact that no specific grantees were named makes it impossible to support the decision on the ground of contract. It is suggested that the gift might have been held effective as a dedication of the land for public purposes, the intention to dedicate and acceptance by user being manifest. *City of Cincinnati v. White*, 6 Pet. 431. This doctrine originally applied only to highways, but in this country extensions of it, though perhaps objectionable because the beneficiary is a limited part of the public, are often allowed. A common example is the dedication of a burying-ground to a particular body of people. *Beatty v. Kurtz*, 2 Pet. 566. And the dedication of land for public schools has been supported. *Carpenteria School Dist. v. Heath*, 56 Cal. 478.

**PROPERTY — STATUTE OF LIMITATIONS — PUBLIC USE.** — The defendant occupied adversely and exclusively for the statutory time part of a railroad's right of way. *Held*, that the use by the railroad for a public purpose, and therefore the right of way is not lost. *Southern Pac. Ry. Co. v. Hyatt*, 64 Pac. Rep. 272 (Cal., Sup. Ct.). See NOTES, p. 146.

**PROPERTY — WILLS — REVIVAL.** — A testator duly executed a second will, which impliedly revoked his first will. Later, with the intention of reviving his first will, he destroyed the second. *Held*, that the first will must be admitted to probate, it conclusively appearing that the testator intended to reinstate that will, and the question of revival depending upon the intent manifested in the destruction of the revoking will. *In re Gould's Will*, 47 Atl. Rep. 1082 (Vt.). See NOTES, p. 142.

**QUASI-CONTRACTS — BREACH OF EXPRESS CONTRACT — MEASURE OF DAMAGES.** — The plaintiff, having committed a material breach of an express contract, sued on the common counts to recover the value of labor and materials furnished under that contract. *Held*, that the value to the defendant of the building produced is the measure of damages. *Gillis v. Cobe*, 59 N. E. Rep. 455 (Mass.). See NOTES, p. 144.

**SALES — WARRANTY — RESCISSION.** — The plaintiff furnished the defendant with a machine of a particular kind in fulfillment of an order. The machine proved defective. *Held*, that the defendant has no right to rescind the contract and return the machine, and that the plaintiff is entitled to recover the purchase price. *Worcester Mfg. Co. v. Waterbury Brass Co.*, 48 Atl. Rep. 422 (Conn.). See NOTES, p. 148.

**TELEGRAPHS — FAILURE TO DELIVER MESSAGE — LIABILITY TO ADDRESSEE.** — *Held*, that the addressee of a telegram containing notice of the fatal illness of his son may recover from the telegraph company for a negligent failure to deliver. *Western Union Tel. Co. v. Norris*, 60 S. W. Rep. 982 (Tex., Civ. App.). See NOTES, p. 143.

**TELEGRAPHS — REASONABLE REGULATIONS — POWER TO STIPULATE AGAINST LIABILITY FOR NEGLIGENCE.** — *Held*, that the stipulation upon a telegraph blank that the telegraph company shall not be liable for mistakes unless the message is repeated, is invalid and does not prevent a recovery for a negligent mistake in the transmission of an unrepeatable message. *Western Union Tel. Co. v. Norris*, 60 S. W. Rep. 982. (Tex., Civ. App.).

This doctrine is law in many states, being rested upon the ground of public policy. *Gillis v. Western Union Tel. Co.*, 61 Vt. 461. Upon principle, however, the decision is difficult to support, and the contrary has been held in England, in many American jurisdictions, and in the Supreme Court of the United States. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1. Telegraph companies as public servants are under an obligation to undertake the transmission of all messages offered them, for a reasonable remuneration and under a full liability for negligence. *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 751. This obligation they offer to perform for the cost of a repeated message, and no case has been found holding such a charge unreasonable. Absolute accuracy in the transmission of messages by electricity is assured only by their repetition, a process frequently involving waste of time and labor. To avoid this, telegraph companies offer a special rate, that is, the cost of an unrepeatable message, to the sender who agrees to take the chance of mistakes in the transmission of the message without repetition. If the sender chooses to accept this offer it is difficult to see how the public interest is injured by the enforcement of the resulting contract. Of course, a wilful or fraudulent mistake in transmission will not be protected by any agreement. *Ellis v. American Tel. Co.*, 95 Mass. 226, 234.

**TORTS — DECEIT — REPRESENTATION BROUGHT ABOUT BY THE DEFENDANT.** — A commercial agency gave the defendant an erroneous rating, based in part on false information given it by the defendant as to his financial condition. Relying on this rating, the plaintiff furnished goods to the defendant on credit. The defendant became bankrupt. *Held*, that the plaintiff cannot recover in an action for deceit. *Tindle v. Birkett*, 57 N. Y. App. Div. 450.

One who makes false statements to a mercantile agency, which repeats them on his authority to a third person, is liable to the latter, if in reliance thereon he extends credit to the maker and is damaged thereby. *Eaton, etc., Co. v. Avery*, 83 N. Y. 31. In the principal case, the plaintiff, not knowing of the defendant's statements, could not rely on them. But he did act to his injury in reliance on the rating of the agency, which was a representation intentionally caused by the defendant. In such circumstances an action might well be allowed, although to do so would be slightly to extend the strict rule that the plaintiff must rely on a representation made by the defendant. No decisions have been found directly supporting the principal case, but see *Peck v.*

*Gurney*, L. R. 6 H. L. 377, 397. In the following cases, opposed to the principal decision, the statements of the defendants were the whole cause of the rating. *Aultman, etc., Co. v. Carr*, 16 Tex. Civ. App. 430; *Bedford v. Bagshaw*, 4 H. & N. 538; *Regina v. Aspinwall*, L. R. 2 Q. B. D. 48. Although in the English cases cited the plaintiffs knew that the defendants had made statements, the cases cannot be distinguished on this ground, since it was the ratings on which the plaintiffs relied.

**TORTS — NEGLIGENCE — JOINT TORT-FEASORS.** — *Held*, that one injured by a defective sidewalk cannot sue the municipality and the property owner in the same action, though both may be liable. *Dutton v. Borough of Lansdowne*, 48 Atl. Rep. 494 (Pa.).

Though the decisions as to who are joint tort-feasors are probably irreconcilable on principle, yet in actions for negligence the better view seems to be that where two persons have caused a single damage to a third, they are jointly liable to him, though there was no concert between them. *Colegrove v. N. Y., etc., Ry. Co.*, 20 N. Y. 492; *Cuddy v. Horn*, 46 Mich. 596. Even where this is not law it has been held that in a state of facts very similar to those in the principal case there is a joint liability because there is a breach of a common duty to repair. *Chicago, etc., Ry. Co. v. Scates*, 90 Ill. 586; *City of Peoria v. Simpson*, 110 Ill. 295. Moreover, this joint liability to the injured person exists though the municipality may recover over against the owner. *McDonald v. Lockport*, 28 Ill. App. 157. In the principal case it is said that the duty of the municipality is not to repair the sidewalk, but to make the owner repair it. This would imply that if the owner cannot be made to repair, the municipality need not do so. But even if this were the correct view of the obligations of the parties, it seems insufficient to distinguish the case from those cited. The decision is, therefore, not to be supported.

**TORTS — SLANDER — PRIVILEGED COMMUNICATION.** — The defendant, a voter and taxpayer, in a conversation with other voters and taxpayers, said that the plaintiff, then a candidate for alderman, was a thief. *Held*, that it was error to charge that truth was the only defence, disregarding the defence of privilege. *Ross v. Ward*, 85 N. W. Rep. 182 (S. D.).

This case is decided under the state Code, which however, as to what constitutes privilege, seems declaratory of the common law as expressed in *Harrison v. Bush*, 5 E. & B. 344. It is perhaps most commonly held that the conduct and qualifications of a public officer or candidate are proper subjects of fair comment, but that a communication of fact in regard to such a person is not privileged. *Hamilton v. Eno*, 81 N. Y. 116. In one state it has been held that a candidate is on the same footing as a private individual. *Banner, etc., Co. v. State*, 16 Lea (Tenn.) 176. A third view is that when statements of fact relate to the candidate's fitness for office and are published by one voter to other voters, the occasion is privileged. *Marks v. Baker*, 28 Minn. 162; see 23 AM. LAW REV. 346. This is of course a conditional, not an absolute privilege, and the defence may be rebutted in the same way as in any other case of conditional privilege. The principal case, in following this liberal view, seems to subserve the public interests without doing violence to the general principles relating to the question of privilege.

**TORTS — TRESPASSING DOG — POISON.** — *Held*, that the defendant is not liable if a neighbor's dog is killed by poison placed by the defendant on his premises to protect them against the depredations of dogs. *Cobb v. Cater*, 38 S. E. Rep. 114 (S. C.).

Although at common law dogs are not the subject of property for all purposes, yet it has been held from an early date that there is sufficient property in a dog to enable the owner to maintain a civil action for injury to the animal. BRO. ABR., tit. TRESPASS, 407; *Brent v. Kimball*, 60 Ill. 211. Accordingly, killing a dog is justifiable only when it is reasonably necessary for the protection of property from serious damage. *Bowers v. Horen*, 93 Mich. 420; *Dunning v. Bird*, 24 Ill. App. 270. There seems to have been no such necessity here. It might be argued, however, that the defendant is not liable for damage caused to a trespassing dog by the condition of the defendant's land. But while one is under no duty to keep his premises safe for trespassers, whether persons or animals, he must not do anything equivalent to laying a trap for them. BISH., NON-CONT. LAW, § 943. It would seem that this rule should have been applied in the principal case, and the weight of authority supports that view. *Gillum v. Sisson*, 53 Mo. App. 516.

**TRUSTS—CONTRACT OF SALE—RIGHT OF VENDEE TO PROCEEDS OF INSURANCE POLICIES.**—The plaintiff and the defendant entered into a contract for the purchase and sale of the defendant's land. Before the purchase price was paid, and while the vendor was still in possession, the premises were injured by fire. The property had been insured by the vendor prior to the contract. *Held*, that the proceeds of the insurance policies, received by the vendor after the contract was fully performed, belong to the vendee. *William Skinner, etc., Co. v. Houghton*, 48 Atl. Rep. 85 (Md.).

The court reaches its conclusion on the theory that by the contract the vendee acquires the rights of substantial ownership, and that the relation of the parties is then that of trustee and *cestui que trust*. Admitting that this is practically true for many purposes, the question as to who should bear the risk of loss while the vendor retains possession has given rise to a difference of opinion. The court's view seems the sound one, and is in accord with the weight of authority. *Paine v. Meller*, 6 Ves. 349; *Lombard v. Chicago Sinai Cong.*, 64 Ill. 477, 482. See 1 COLUMBIA LAW REV. 1. There is, however, strong authority *contra*. *Gould v. Murch*, 70 Me. 288. See 9 HARV. LAW REV. 106, 111. Under any view the relation of the parties would seem to be more nearly that of mortgage than of trust in the strict sense. *Lysaght v. Edwards*, L. R. 2 Ch. Div. 499, 506. And granting that the risk of loss is on the vendee, the conclusion of the court by no means follows. A contract of insurance is a personal contract of indemnity against loss to the insured's interest in the property. MAY, INS., § 6. Hence it is difficult to see on what principle the vendee is entitled, without an assignment, to this right obtained by the vendor wholly for himself. The English law is settled contrary to the principal case. *Rayner v. Preston*, L. R. 18 Ch. D. 1. There seems to be no American decision exactly in point except *King v. Preston*, 11 La. Ann. 95, which follows the English law. But the principal case is supported by numerous *dicta*. Cf. *Hill v. Cumberland Valley Co.*, 59 Pa. St. 474, 478.

**TRUSTS—FRAUD OF TRUSTEE—LIABILITY OF TRANSFEREE.**—An executor under a will containing a legacy to the defendant, a missionary society, paid the legacy out of funds not part of the estate, but held in trust for the plaintiff. The defendant afterwards, in good faith, expended the money. The plaintiff brings a bill in equity. *Held*, that he cannot recover. *Holly v. Domestic, etc., Soc.*, 21 Sup. Ct. Rep. 395.

According to the weight of authority, the transfer of negotiable paper in payment of an antecedent debt is a transfer for value. *Swift v. Tyson*, 16 Pet. 1. *A fortiori* this is true of money. Even in New York, where the contrary view is held as to negotiable paper, it does not apply to money. *Stephens v. Board of Education, etc.*, 79 N. Y. 183. The society might therefore be treated as a purchaser for value, the money being received in payment of the executor's liability. Even if a volunteer, however, the society should be protected. Where a volunteer has parted with the property in good faith he is not liable to the defrauded person, except to the extent of the consideration received by him. *Bonesteel v. Bonesteel*, 30 Wis. 516; *Robes v. Bent*, Moo. K. B. 552. Where he has received no consideration, having parted with the property, he could be liable only on the ground of breach of a constructive trust. But it is not against conscience for him to transfer while still in ignorance of the defrauded person's claim, and so there is no breach of trust. From either point of view, therefore, the case seems correct.

**TRUSTS—NOTICE—LIABILITY FOR AIDING TRUSTEE'S BREACH.**—Shares in the defendant corporation standing in the name of X, as trustee, were assigned by him in breach of trust, the instrument of assignment describing him as trustee. The defendant, having no notice that the assignment was improper, but without making inquiry, transferred the shares on its books to the assignee. *Held*, that the term "trustee" on the books of the company and in the assignment gave notice of the trust, that there is a presumption that a trustee has no power to sell or transfer the trust property, and that the defendant must therefore compensate the *cestui* for the loss incurred. *Geyser-Marion, etc., Co. v. Stark*, 106 Fed. Rep. 558 (C. C. A., Eighth Circ.).

In applying the principle that a purchaser for value takes the trust property subject to equities of which he has notice, it is held that actual notice that the property is incumbered constitutes constructive notice of those equities which due diligence would have disclosed. *Shaw v. Spencer*, 100 Mass. 382, 390; *Jones v. Smith*, 1 Hare, 43, 55. Provided that he has notice, one who aids a trustee in committing a breach of trust is equally liable to the *cestui*. *Duckett v. National Mech. Bank*, 86 Md. 400. As in the case of a purchaser, actual notice that a breach is being committed is not indispensa-



ble, and it has frequently been held that the term "trustee" carries constructive notice. *Marbury v. Ehlen*, 72 Md. 206. The basis of liability is therefore the same in both classes of cases, namely, a negligent confederation with the trustee in an act injurious to the *cestui*. While in some cases of trust of personal property there is an implied power of sale, *Jones v. Atchison, etc., R. R. Co.*, 150 Mass. 304, trustees do not usually have such power, and these exceptional cases afford no excuse for a total failure to investigate, as in the principal case.

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## REVIEWS.

LEGISLATIVE METHODS AND FORMS. By Sir Courtenay Ilbert, K. C. S. I. E. Oxford: The Clarendon Press; London and New York: Henry Frowde. 1901. pp. xxxi, 372.

The author's position, as Parliamentary Counsel to the Treasury, is a sufficient guaranty of the worth of any work from his hands on the subject of legislative methods, since upon him rests the responsibility for the drafting and form at every stage of all the Government bills introduced into the British Parliament. From a man who has so ably filled this important office much was to be expected, and those who will have the good fortune to read Sir Courtenay Ilbert's book will be in no wise disappointed. Beginning with a brief sketch of the customary law of England and its relation to the statute law the author contrasts the English legal system with that of various countries of continental Europe. After a short discussion of the contents of the English statute book and the different editions of the Statutes, he describes at considerable length the various efforts to systematize and improve the statutory law, both by the expurgation of defunct acts and by the consolidation of living measures. The chapter on codification is intensely interesting. The author ascribes the failure of the ambitious projects of the various codifiers partially to the absence in England of the motive force so keenly felt in continental Europe, namely, the absolute necessity consequent on increasing commerce of doing away with the diverse systems of law that so frequently prevailed in different portions of what had become one country. For example, in Germany, before the present code there were six general systems of law in force, besides numerous local customs. In England, however, the King's Writ ran over the entire country centuries before there was any central judicial authority in the continental nations. But the author finds the chief reason for the dilatoriness of England as regards codification in the haphazard system of English legal education, the student rarely seeking to take a scientific view of the legal principles he is applying. The author does not consider the cause of codification hopeless in England, notwithstanding the relaxation of such efforts since 1896, but he recognizes the great difficulties in its way — not the least of which is the general unpopularity of these acts, and the almost entire passivity of the legal profession, with the exception of the commercial lawyers, to whose efforts are due what legislation there is along that line — the Partnership Act, The Bills of Exchange Act, and the Sale of Goods Act, to say nothing of that monumental piece of consolidation, the Merchants' Shipping Bill.

A great deal of very valuable material is to be found in the chapter

dealing with Indian and Colonial legislation. Its contents are largely based on the replies of the Colonies to questions propounded by the Colonial Office, at the instance of the Society of Comparative Legislation. The space devoted to each Colony is necessarily small, but the author has readily seized the salient points of their legislative methods. A noteworthy chapter treats of the efficiency of Parliament as a legislative machine. The book concludes with numerous specimens of statutory forms, and a discussion of their respective advantages and disadvantages. In short, it would be difficult to imagine a book of more use to the practical legislator. The style is so clear and pleasant, and the subject matter of such vital importance, that notwithstanding the necessarily technical nature of portions it is of great interest even to the unlearned reader.

F. R. T.

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**JOHN MARSHALL.** By James Bradley Thayer, LL. D. Boston and New York: Houghton, Mifflin & Co. 1901. pp. 157. It is not often that a man accomplishes so many things in one little book as Prof. Thayer has done in this one. He has filled in the large but rather vague outlines of the historical portrait of Marshall, until we seem really to see the man; and he has given us a concise, discriminating, and convincing estimate of the great judge's purposes and achievements, particularly of his inestimable service to posterity in giving to the Constitution the broad and vigorous interpretation which carried the new nation safely through its early difficulties, and gave it strength for the supreme test of the Civil War. These things seem to have been done without yielding to that partiality to which biographers are so prone, for Prof. Thayer does not hesitate to point out a few indiscretions and errors, nor to admit that in many departments of legal learning Marshall has had equals or superiors among American jurists. Nevertheless a perusal of the book, which is rather a sketch than a biography, leaves the reader not only more than ever convinced of the substantial basis of Marshall's fame, but filled with a new admiration for the sweetness, simplicity and strength of his personal character. To this Prof. Thayer has added, out of his own wide observation and vigorous judgment, a few practical suggestions on the subject of Constitutional Law as applied to legislative enactments, which well merit the careful consideration of all who have to do with the making or the interpretation of our laws.

**THE LAW AND PROCEDURE OF UNITED STATES COURTS.** By John W. Dwyer, LL. M. Ann Arbor: George Wahr. 1901. pp. xxi, 339. The increasing importance of the Federal Courts makes familiarity with the organization and jurisdiction of these courts more and more necessary, and it is chiefly of these two subjects that this work attempts to give a general outline. Beginning with a brief historical review of the development of this country, the author describes the organization of the various United States Courts and the division of the judicial power under the Constitution and acts of Congress. The original and appellate jurisdiction of the four main branches of the Federal Courts is then considered in detail, with a chapter on removal of cases from the State Courts, and a brief general statement of certain extraordinary remedies and rules of procedure.

The work is not an exhaustive examination of the authorities, nor is

the subject treated with sufficient detail to be of great value except to the beginner. The extracts from leading decisions in the Supreme Court, inserted extensively throughout the work, while of great assistance, in several instances might have been judiciously condensed. The treatment is in general accurate, but to the student the book would be of greater value with more extensive references to authorities under the large number of related topics necessarily so briefly touched upon. On the whole, however, the author has accomplished his purpose of presenting an elementary outline of this important branch of the law.

**FALSTAFF AND EQUITY: AN INTERPRETATION.** By Charles E. Phelps. Boston and New York: Houghton, Mifflin & Co. 1901. pp. xvi, 201. *Review will follow.*

**AN EPITOME OF LEADING CASES IN EQUITY.** By W. H. Hastings Kelke, M. A. London: Sweet & Maxwell, Limited. 1901. pp. xx, 240. *Review will follow.*

**THE BENCH AND BAR AS MAKERS OF THE AMERICAN REPUBLIC.** By Hon. W. W. Goodrich. New York: E. B. Treat & Co. 1901. pp. 65. *Review will follow.*

**A COMPILATION OF THE BAR EXAMINATION QUESTIONS OF THE STATE OF NEW YORK.** Edited by Wilson B. Brice. Albany: Matthew Bender. 1901. pp. 229.

**THE TAX LAW OF THE STATE OF NEW YORK.** Bender Edition. Albany: Matthew Bender. 1901. pp. 168.

**LAW OF REAL PROPERTY.** By Charles T. Boone. Second Edition. San Francisco: Bancroft Whitney Co. 1901. 3 vols. pp. xxvii, 612; 631; xiii, 651. *Review will follow.*

**PROBATE REPORTS ANNOTATED.** Vol. 5. By George A. Clement. 1901. New York: Baker, Voorhis & Co. pp. xxix, 774. *Review will follow.*

**A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.** By Henry Brannon. 1901. Cincinnati: W. H. Anderson & Co. pp. ix, 562. *Review will follow.*

## THE INSULAR TARIFF CASES IN THE SUPREME COURT.

THE editors of the REVIEW have delayed the issue of this number until they could obtain from Washington authentic copies of the opinions rendered in the Insular Tariff Cases on May 27 last. There is opportunity now to give only a slight and very imperfect notice of them.

It is fortunate for the country and for the future of our system of constitutional law that the Supreme Court has recognized the essentially political nature of the questions with which the General Government has had to deal in legislating for our new possessions. But it is also matter for regret and anxiety that, in reaching its conclusions, the court should have had so narrow a majority. This fact, and much that is said in these opinions, may well draw sharp attention to the vital and absolutely fundamental distinction between the legislative and the judicial question in cases of the class to which these now under consideration belong. Where our system intrusts a general subject to the legislature, nothing but the plainest constitutional provisions of restraint, and the plainest errors, will justify a court in disregarding the action of its coördinate legislative department, — no political theories as to the nature of our system of government will suffice, no party predilections, no fears as to the consequences of legislative action. In dealing with such questions the judges are, indeed, not acting as statesmen, but their function necessarily requires that they take account of the purposes of statesmen and their duties; for their own question relates to what may be permissible to a statesman when he is required by the Constitution to act, and, in order that he may act, to interpret the Constitution for himself; it is never, in such cases, merely the dry question of what the judges themselves may think that the Constitution means.

Of the half dozen cases, more or less, lately decided, the most important is that of *Downes v. Bidwell*, raising the question of the constitutionality of the Act of Congress which took effect May 1, 1899, providing, temporarily, civil government and a revenue system for Porto Rico. The plaintiff, in the United States Circuit Court for the Southern District of New York, sought to recover

from the collector duties on oranges brought there from the island, which had been paid under protest in November, 1900. The plaintiff lost his case below ; and on error to the Supreme Court the judgment was affirmed. In deciding, as they did, that the legislation of Congress was constitutional, the judges stood five to four. They held that, in the absence of treaty provisions, a region acquired by conquest and treaty does not immediately become a part of the United States, in the sense of that provision of the Constitution which requires that duties, imposts, and excises shall be uniform throughout the United States ; but that Congress may subject it to such revenue legislation as may seem best ; so long, at least, as it is not permanently "incorporated" into the United States.

Implied in this proposition, and in the reasoning employed by all the judges who sustain it, are two or three other general propositions of much importance.

1. As to the political catch which we have been hearing so much, about the Constitution following the flag or not following it, we may collect from all the opinions, including (as to this matter) those of the minority, that wherever the flag is rightfully carried the Constitution attends it. To be sure that is obvious enough. That is to say, no rightful power can ever be exerted under the authority of the United States, which is not founded on the Constitution. But all parts of that instrument are not relevant to all inquiries, or applicable to all situations. And, moreover, the silence of the Constitution and its tacit references and implications, pointing steadily to the usages of other nations, — these go with it, as well as its expressions. The Constitution is not a code of detailed precepts.

2. The United States may acquire territory as the result of war and treaties, without any qualification as to kind or quantity, or as to the character of its population. It may be Canada, or a cannibal island, or an island of slaves and slave owners.

3. The mere acquisition or cession of a region does not "incorporate" it into the United States so as to subject it generally to those clauses of the Constitution which restrain and prohibit certain action by the Congress of the United States ; but such regions may be temporarily governed, in some respects, at least, as seems most suitable for their own interests and those of the United States.

4. The question of when these regions shall be "incorporated" into the United States is for Congress.

The majority consisted of Justices Gray, Brown, Shiras, White and McKenna. The minority was made up of Chief Justice Fuller and Justices Harlan, Brewer, and Peckham. These four held that the Act authorizing the duties in question was invalid because not conforming to the constitutional requirement that duties, imposts, and excises shall be uniform throughout the United States, since the treaty, as they held, had instantly "incorporated" Porto Rico into the United States. Such, always and necessarily, in their view, is the operation of a treaty by which the United States acquires a new region. While these judges seem to agree, expressly or tacitly, to the first two of the four general propositions above stated, they deny the second two.

The opinion of the minority was given by the Chief Justice; and there was a separate concurring opinion by Justice Harlan. For the majority three opinions were given,—one, announcing the judgment of the court, by Justice Brown; one for himself, by Justice Gray, mentioning, in passing, that in substance he agreed with Justice White; and one by Justice White, for himself and Justices Shiras and McKenna.

The Chief Justice relies strongly on what he regards as the decision, and not merely a dictum, of Chief Justice Marshall in *Loughborough v. Blake*, that territories are included in the phrase "throughout the United States," in that clause of the Constitution which requires duties to be uniform; and he insists that the territories are covered by the general restraints and prohibitions of the Constitution. The existing legislation for Porto Rico, moreover, seems to him to "incorporate" the island into the United States, and not to be of a temporary sort.

In concurring with this opinion Justice Harlan adds a separate one, enlarging on some points, and replying, with much emphasis, to some matters in the opinions of the majority which were not commented on by the Chief Justice. Among other things, he seems to see in these opinions assertions of a doctrine of State Rights which probably would not be found by the ordinary reader.

Justice Brown, in announcing the judgment of the court,<sup>1</sup> iden-

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<sup>1</sup> The learned reader will not need to be reminded that the opinion of a justice who is charged with the duty of rendering the judgment of the court often reaches the common result by a process which is not that of the majority. It is enough to refer to the opinion of Chief Justice Taney in the *Dred Scott* case, sometimes, *e. g.* by Howard, the reporter, erroneously called the "opinion of the Court." See Thayer's *Cases on Constitutional Law*, i. 493 n.

tifies the situation of Porto Rico with the original status of all the other "territories," and therefore deals with the general question of the power of the United States over its territories when first acquired. Arguing from the history of the government, its dealings with newly acquired territory through all its departments, and from the cases, he finds the general proposition true that the Constitution deals with and provides for States and not "territories;" in general, therefore, he holds that its prohibitions and restraints upon legislation, including the revenue-uniformity clause, do not extend to the latter. But he reserves the question as to whether some of these provisions do not withdraw from Congress all power to do certain things, in any region whatever. He holds, however, that Congress may extend any part or all of these clauses to the territories; and where once this has been done he declares that it cannot again withdraw their operation. If it be true then, as we believe it is, that this has been done in the case of all our older territories (Rev. St. U. S. s. 1891), the doctrine stated would, on this ground, put our new possessions on a different footing from the present position of all the others.

Justice White finds from his examination of the judicial decisions and administrative precedents, as well as from the history of the government and general principles, that the territories are subject to most of the restraints and prohibitions on legislative power in the Constitution; but that some of them are not applicable to all situations alike. And as regards a region acquired by war and treaty he holds that it can never be incorporated into the United States merely by a treaty; the action of Congress, express or implied, must exist to accomplish that; and pending action of that sort, it may be governed as circumstances require; subject to a few clauses of the Constitution which, as it is conceived, withhold from Congress all power to legislate in certain ways.

Justice Gray, while "in substance agreeing with the opinion of Mr. Justice White," states that the question does not touch the authority of the United States over the "territories" commonly so called, or over Alaska or Hawaii, but concerns only regions gained by war and treaty from a foreign state. As regards such possessions there must necessarily, he says, be a transition period, even after a treaty. From the natural operation of a treaty and from the terms of the one in question it is argued that action of Congress is necessary in order to set up civil government; and, if Congress is not yet ready to deal with the subject finally, it may set up "a temporary government which is not subject to all the

restrictions of the Constitution." The legislation here in question was in his judgment part of such a system and was valid.

In the case of *De Lima v. Bidwell*, a similar action, but relating to duties collected in New York after the treaty and before the Act of Congress, Justice Brown voted with those who were the minority in the case of *Downes v. Bidwell*, and thus gave, in the present case also, the opinion which announced the judgment of the court. The question was whether the Dingley tariff act continued to apply to Porto Rico after the treaty.

The provisions of that Act relate to duties on imports from "foreign countries." Could duties be collected on goods from Porto Rico after the treaty? To deny this, was obviously easy for the four judges who held in the other case that the treaty completely "incorporated" the island into the United States, and subjected it to the general provisions of the Constitution. Justice Brown, who did not think that, agreed with these four on the different but simple and easily intelligible ground of the construction of the Dingley Act, namely, that after the treaty Porto Rico belonged to us, and was no longer a "foreign country" within the meaning of the statute.

The other four judges held that not merely the "political status and civil rights" of the people of the island remained unaffected by the treaty until Congress acted, but also the revenue and customs regulations previously applicable to commerce with them. Justice McKenna gave an opinion for himself and Justices Shiras and White. Justice Gray in five lines simply declared his "dissent from the judgment," as being, in his opinion, irreconcilable with the opinion of the court in *Fleming v. Page*, 9 How. 603, and "the opinions of the majority of the justices in the case, this day decided, of *Downes v. Bidwell*."

Could the continued application of the Dingley law be rested upon the will of the executive, remaining in military control of the island after the treaty as well as before, until Congress should act, it would be easy to agree with the conclusion of these four judges. But of course it cannot; for this is a question of the operation, in New York, of a law dealing only with "foreign countries." To the present writer it seems a very difficult result, to find, either from the terms of this treaty, or from the nature of treaties in general, or from the previous decisions of the court, that Porto Rico should be regarded, after the ratification, as still included within the terms of the Dingley law.

*J. B. T.*



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## THE INSULAR CASES.<sup>1</sup>

THIS year of our Lord has been one of unusual significance to the legal profession. It has seen universal and spontaneous homage paid by bench and bar and country to "the great Chief Justice," "the greatest judge in the language." He is conceded to be the greatest authority upon the construction of the Constitution that ever adorned the most august tribunal known to our institutions. All agree that, more than any other man realizing that our "Constitution is formed for ages to come, and is designed to approach immortality as nearly as human institutions can approach," he expounded and developed it, with scientific accuracy, upon enduring lines, buttressed by accurate reasoning, "establishing those sure and solid principles of government on which our constitutional system rests." The Supreme Court of the United States suspended its sittings in order that through its distinguished chief it might witness "to the immortality of the fame of this sweet and virtuous soul, whose powers were so admirable and the results of their exercise of such transcendent importance." It is certainly an interesting and significant fact that, at the same term during which these ever memorable exercises occurred, that court rendered a judgment by a disagreeing majority of one, overruling a case which had withstood unimpaired the assaults of time for eighty years. A case decided by the same tribunal by a unani-

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<sup>1</sup> Address delivered before the American Bar Association, August 22, 1901, at Denver, Col.

mous court, whose reasons therefor were luminously stated with his usual accuracy and ability by the incomparable Marshall. A judgment clearly inconsistent with other judgments rendered on the same day, without any opinion of the court upon which to rest, endeavored to be sustained by the opinions of different justices, in irreconcilable conflict with each other. A judgment involving fundamental constitutional questions of more vital and transcendent importance than any hitherto determined.

The Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without a parallel in our judicial history. It is unfortunate that the cases could not have been determined with such a preponderance of consistent opinion as to have satisfied the profession and the country that the conclusions were likely to be adhered to by the court. Until some reasonable consistency and unanimity of opinion is reached by the court upon these questions, we can hardly expect their conclusions to be final and beyond revision. A statement of the cases is essential to show what was actually decided. The cases were: *De Lima v. Bidwell*; *Downes v. Bidwell*; *Huus v. New York and Porto Rico Steamship Company*; *Goetze v. United States*; *Crossman v. United States*; and *Armstrong v. United States*.

In *De Lima v. Bidwell* the question was whether after the cession of Porto Rico to the United States, by the treaty of Paris, it remained a foreign country within the meaning of the tariff laws, the action being brought to recover duties collected prior to the passage of the Foraker Act, under the Dingley Act, which provided that "there shall be levied and collected and paid upon all articles imported from *foreign countries*," etc., certain duties therein specified. The court held "that at the time these duties were levied, Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted, and that the plaintiffs are entitled to recover them back." Mr. Justice Brown delivered the opinion of the court, and with him concurred Mr. Chief Justice Fuller, Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Peckham. Mr. Justice McKenna dissented, and drew an opinion in which Mr. Justice Shiras and Mr. Justice White concurred, and Mr. Justice Gray dissented in a short note. *Downes v. Bidwell* was an action to recover duties collected under the Foraker Act, upon "merchandise coming into the United States from Porto Rico," to use the pecu-

liar and somewhat ungainly language of that act. It involved the constitutionality of that part of the act, and five members of the court concurred in a judgment holding that part of the act constitutional. Mr. Justice Brown announced the conclusion and judgment of the court, affirming the judgment of the court below. He did not pronounce its opinion, but rendered one of his own. Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, rendered an opinion uniting in the judgment of affirmance. Referring to Mr. Justice Brown's opinion, he stated that the reasons which caused him to concur in the result "are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived." Mr. Justice Gray concurred in substance with the opinion of Mr. Justice White, but summed up so as to "indicate" his "position in other cases now standing for judgment."

Technically speaking, there is no opinion of the court to sustain the judgment. Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Peckham, delivered a dissenting opinion, and Mr. Justice Harlan delivered a dissenting opinion giving some additional considerations. *Dooley v. United States* was a suit to recover duties collected upon goods exported from New York to Porto Rico, partly before and partly after the ratifications of the treaty, but in every instance prior to the passage of the Foraker Act. As to the duties collected prior to the ratifications of the treaty, the court were unanimous in holding that they were legally exacted "under the war power." The same justices who concurred in the *De Lima* case concurred in this as to the duties collected after ratifications. Mr. Justice Brown delivered the opinion of the court, holding that the "authority of the President as commander-in-chief to exact duties upon imports from the United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject." The justices who dissented in the *De Lima* case dissented in this. Mr. Justice White delivered the dissenting opinion. *Huus v. New York and Porto Rico Steamship Company* raised the question as to whether trade between the United States and Porto Rico was, after the passage of the Foraker Act, "coasting trade," and the court were unanimous in holding that it was. *Goetze v. United States* and *Crossman v. United States* involved the questions determined in the *De Lima* case, and were controlled by that case. *Armstrong v. United States*

was controlled by the Dooley case. Two cases argued at the same term remain undecided. *Fourteen Diamond Rings v. United States*, — rings brought from the Philippines into the United States after the ratification of the treaty of peace, without the payment of duty, and seized for non-payment, — and *Dooley v. United States*, raising the validity of duties collected upon goods "coming into Porto Rico from the United States" after the passage of the Foraker Act.

In the unsettled condition of the court it is hardly worth while to speculate as to the results in these cases. The *Diamond Rings* case no doubt depends upon what the court holds the status of the Philippines to be, whether civil or military. If the *Dooley* case is controlled by the *Downes* case, there would seem to be no good reason why it should not have been decided. That it was not, raises the inference that it would have been decided adversely to the government, or that there was a greater difference of opinion than usual with reference to it. Mr. Justice Gray is the only one who indicates his "position" in this case. In his opinion in the *Downes* case he says, after referring to duties "established on merchandise and articles going into Porto Rico from the United States, or coming into the United States from Porto Rico," as temporary : —

"The system of duties [clearly including imports and exports] temporarily established by that act during the transition period was within the authority of Congress under the Constitution of the United States."

No other member of the majority is prepared to indicate that Porto Rico, while a foreign territory as to the revenue clause of the Constitution, so that imports therefrom are dutiable, is not also foreign within the meaning of that other clause of the Constitution, relating to revenue, which reads, "No tax or duty shall be laid on articles exported from any state." The converse must be true as to goods going the other way, and they would be exports from some state to "such island," and hence obnoxious to this clause. Apprehending this, perhaps, Mr. Justice White in the same case always follows the ungainly language of the act in describing this commerce.

Just how goods "coming into Porto Rico from the United States" can be other than exports from some state we cannot well see, but with these opinions before us it will not do to say that it will not be so held, and some inconsistent reasoning given therefor. Upon

this point the language of Mr. Justice Miller in *Woodruff v. Parham*,<sup>1</sup> is suggestive:—

“Is the word ‘impost’ here used intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one state into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any state, for no article can be imported from one state into another which is not, at the same time, exported from the former.”

It is difficult to see how refusing to call a duty an export duty, when it is in fact such, can change its character.

#### THE DOWNES CASE.

The Downes case is the only one that passes upon questions that apply to permanent conditions, or that attempts to furnish a foundation for a permanent government policy. All that is decided by that case is that as to “merchandise coming into the United States from Porto Rico” Congress is not restrained by the Constitution in imposing a discriminating tariff against Porto Rico. In other words, as to imports from Porto Rico Congress can constitutionally discriminate. It may be said that the case involves other absolute powers, but that is as far as the case itself goes. Whether all the other constitutional restrictions apply, and if not, which apply, remains to be determined. Four of the majority (and I include Mr. Justice Gray, as he says that in “substance” he agrees with the opinion of Mr. Justice White) are evidently appalled by the enormity of the argument that would deprive Porto Rico of all the constitutional guarantees as to civil rights. They repeatedly so declare in the opinion of Mr. Justice White, as though fearful that it might be inferred that they entertained that view, as appears from the following excerpts:—

“Hence it is that wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits.”

“As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every provision of the

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<sup>1</sup> 8 Wall. 123.

Constitution which is applicable to the territories is also controlling therein." . . .

"From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island, was potential in Porto Rico."

"Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizens, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power." . . .

"The doctrine that those absolute withdrawals of power which the Constitution has made in favor of human liberty are applicable to every condition or status has been clearly pointed out by this court." . . .

"There is in reason, then, no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice, which the Constitution has absolutely denied." . . .

"The fact that the act directs the officers to swear to support the Constitution does not militate against this view, for, as I have conceded, whether the island be incorporated or not, the applicable provisions of the Constitution are there in force."

It is unfortunate that Mr. Justice White, with his keen appreciation of the sacredness of constitutional rights, in order to sustain his conclusions in this case was obliged to use a train of reasoning that manifestly kept pressing upon him the idea of despotic power, and thus required this continual negation. It required him to "protest too much." Nevertheless just what will be held "applicable provisions" we do not know, but as the four dissenting justices hold that the Constitution now applies to Porto Rico to that extent, we can feel confident that at least as to applicable provisions eight justices will concur. Mr. Justice Brown is not as sensitive as his brethren, who agree with him as to *what* in the Downes case, but disagree as to *how*. He comes the nearest to the contention of the government, citing with approval: —

"Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but those limitations would exist rather by inference and the general spirit of the Consti-

tution, from which Congress derives all its powers, than by any express and direct application of its provisions."

He says : —

"To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states."

He proposes to be cautious : —

"We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application."

Again : —

"There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests. . . . We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. . . . It does not follow that in the mean time, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress."

"We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect."

He has certainly left the door sufficiently open. Just how "certain principles of natural justice" could be used in court to invalidate an act of Congress, unrestrained by any constitutional provision, we are not informed. The inconsistency on the part of Mr. Justice Brown in the *De Lima* and *Downes* cases is obvious, and tends to impair our confidence in his conclusions. On the other hand, the consistency of the dissenting justices in the *Downes* case, and the manner in which their reasoning without distortion answers the various conditions, tend to establish its correctness. It is true that magazine and newspaper editors, who feel bound to sustain the conclusions, say, to quote one of them : "They appear to us entirely consistent with each other, and entirely clear in themselves."

This is not an assertion that they are "consistent," but that "they appear to us." On this point I will assume that the court knows at least as much as any one else, and let it speak for itself.

Mr. Justice Gray, in his note in the *De Lima* case, dissents because, "It appears to me irreconcilable . . . with the opinions of the majority of the justices in the case, this day decided, of *Downes v. Bidwell*." Mr. Justice White in his dissenting opinion in the *Dooley* case, in which Mr. Justice Gray, Mr. Justice Shiras, and Mr. Justice McKenna concurred, stated the inconsistency thus:—

"Now, this court has just decided in *Downes v. Bidwell* that, despite the treaty of cession, Porto Rico remained in a position where Congress could impose a tariff duty on goods coming from that island into the United States. If, however, it remained in that position, how then can it be now declared that it ceased to be in that relation because it was no longer foreign country within the meaning of the tariff laws?" . . .

The fact that somebody does not see the inconsistency makes it none the less obvious. The inconsistency of itself does not tend to demonstrate which conclusion was wrong, and is only material as tending to detract from the weight to be given to the reasoning generally. Is the conclusion in the *Downes* case sustained by such reason and authority as to justify us in assuming that it is the deliberate and final judgment of the court upon this great question; that it has laid down the rule which will govern the Republic for all time, so that although new territory may be acquired, the Republic will not expand, but will simply accumulate property? It seems to me more than doubtful.

Mr. Justice Brown holds that under that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States," the term "United States" is confined to the several states, and that the territories and the District of Columbia are not "states" and not included therein, and therefore Porto Rico, being a territory, is not protected thereby.

#### HEPBURN *v.* ELLZEY.

The earliest case upon which he relies is *Hepburn v. Ellzey*,<sup>1</sup> where it was held that under the clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of the different states, a citizen of the District of Columbia could not maintain an action in the circuit

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<sup>1</sup> 2 Cranch, 445.



court of the United States. It is true that Mr. Chief Justice Marshall there said:—

“It becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the Constitution.”

It is also true that Mr. Justice Marshall, recognizing the distinction between the term “state,” as used in that provision, and the “United States,” said, in speaking of the same man that he had just held was not a citizen of a “state”:—

“It is true that as *citizens of the United States*, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the Union, should be closed upon *them*. But this is a subject for legislative, not for judicial consideration.”

It seems that Marshall could see how a man could be within the “United States” and not be in a “state.” It will be observed that the learned justice does not quote this remark.

An examination of the Downes case requires the consideration of at least four great leading cases: *Loughborough v. Blake*,<sup>1</sup> *Insurance Co. v. Canter*,<sup>2</sup> *Cross v. Harrison*,<sup>3</sup> and *Dred Scott v. Sandford*.<sup>4</sup>

In the first three cases the court were unanimous, and in the last case as to the proposition here involved there was no dissent, and as to that proposition the authority of these cases prior to the Downes case had never been denied or questioned. One is directly and two are practically overruled by a disagreeing majority of one.

#### LOUGHBOROUGH v. BLAKE.

*Loughborough v. Blake* is directly in point. The provision of the Constitution in question was considered by the court, and Mr. Chief Justice Marshall delivered the unanimous opinion, in which he said:—

“The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri,

<sup>1</sup> 5 Wheat. 317, 1820.

<sup>2</sup> 16 How. 164, 1853.

<sup>3</sup> 1 Pet. 511, 1828.

<sup>4</sup> 19 How. 393, 1856.

is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one, than in the other."

Mr. Justice Brown says these are "certain observations which have occasioned some embarrassment in other cases," but I submit in none so great as in the Downes case. The extraordinary ingenuity manifested in this case by the earnest effort to escape from that authority constitutes one of its most striking features. The learned Attorney General examined the original files, and found that it was uncertain whether the suit related to "one black gelding about nine years old" or "to ten cows and ten oxen," and therefore it was "scarcely more than a moot case." Upon an analysis of the case he found that "the point argued in the case was whether the District of Columbia *\*could*<sup>1</sup> be taxed, seeing that it had no representative in Congress. *\*That* was the question argued and *\*that* is what was decided." Although these arguments were presented with all of his accustomed vigor and ability, he does not appear to have succeeded in convincing anybody but himself, as these contentions were not even alluded to by any justice. Mr. Justice Brown is entitled to the credit of introducing in an opinion for the first time a new method of disposing of that case. I do not say he discovered it, for it is true that there were statesmen who, in groping about for a way of escape from Marshall's logic, had blazed out this path. He admits that the conclusion is correct, "so far at least as it applies to the District of Columbia." He cannot quite get up to denying the case *in toto*. He then gives the reason why he concedes so much: —

"This district had been a part of the states of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the federal and state governments to a formal separation. The mere cession of the District of Columbia to the federal government relinquished the authority of the states, but it did not take it out of the United States, or from under the ægis of the Constitution."

This reasoning is inconsistent with the theory upon which the

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<sup>1</sup> Wherever words are printed in *italics*, only those in which an *\** is used are italicized in the original.

whole case is based, *i. e.*, that the "United States" is composed only of "states." We have here a part of the "United States" which is not a state. Therefore, it is quite possible for the term "United States" to include territory outside of the states. "Neither party," he says, "had ever consented to that construction of the cession." Inasmuch as the question was never even dreamed of until invoked by the exigencies of this case, it is quite evident that it was not an element of "the cession."

Again, "if before the district was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the district was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the district, what it could not do directly." With all due respect to the learned justice, this illustration suggests a contingency that is impossible. Congress desires to affect certain persons by unconstitutional legislation who now live in a state. This it cannot do. Therefore, it creates the District of Columbia out of the territory on which they live in order that it may legislate with reference to them unrestrained by the Constitution. Could anything be more finical? He says: —

"The district still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the federal government."

Therefore he says the conclusion was right in *Loughborough v. Blake*, but the reasons were wrong, mere *dicta*.

This appears to be the adhesive feature of the Constitution. Like a way appendant or appurtenant, or certain covenants in a deed, the Constitution runs with the land, and is inseparably united thereto. The proposition has the merit of novelty. It is submitted that no sufficient reason is given for its existence, and that it rests upon the unsupported assertion of the learned justice that it is so. He does not inform us how, but it is.

If this adhesive proposition is sound, what becomes of the decision in *Hepburn v. Ellzey*? Prior to the creation of the District of Columbia, it is clear that any citizen of either state, living in the territory afterward made the district, had the constitutional right to bring an action in the circuit court of the United States. Being a constitutional right, it "had attached to it irrevocably." Therefore no power could deprive a citizen of the district of that right. It seems that Mr. Chief Justice Marshall, notwithstanding

all this, disconnected the citizen in that case from the Constitution. Perhaps he had not heard of this theory, or can it be that only a part of the Constitution adheres? Only so much as is necessary to escape *Loughborough v. Blake*? This may be the case, in view of the fact that in 1897 in *Hooe v. Jamieson*,<sup>1</sup> a case turning on the precise point decided in *Hepburn v. Ellzey*, the court still persisted in disconnecting a citizen of the District of Columbia from the Constitution, and affirmed *Hepburn v. Ellzey*, and Mr. Justice Brown concurred in the opinion. Moreover, in the Downes opinion he cites with approval those cases for the purpose of showing that the District of Columbia is not a "state," and, therefore, no part of the United States, and then on the next page asks us to believe that having once been a part "it still remained a part of the United States." Is not this asking too much, and will not some new and more universally operating theory have to be evolved before *Loughborough v. Blake* is disposed of?

Mr. Justice White in his opinion undertakes with great diligence, research, and ability to establish the doctrine that "the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress," and that "Congress is vested with the right to determine when incorporation arises." His idea is that undesirable territory otherwise would be "without the consent of the American people as expressed by Congress, and without any hope of relief, indissolubly made a part of our common country." In other words, once incorporated territory cannot afterwards be alienated or disposed of. His object undoubtedly is to establish a condition during which "when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate," that is, during which it can be disposed of. He holds that Porto Rico has not been "incorporated," and, therefore, the uniformity clause does not apply. Mr. Justice Harlan most pertinently suggests: "What is meant by such incorporation we are not fully informed, nor are we instructed as to the precise mode in which it is to be accomplished." Mr. Justice White's opinion is unfortunately lacking in perspicuity upon both of these points. He repudiates Mr. Justice Brown's method of disposing of *Loughborough v. Blake*. He cites that case to support the following proposition:—

"But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods

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<sup>1</sup> 166 U. S. 395.

coming into the United States from a territory which has been incorporated into and forms a part of the United States."

Assuming that prior to 1820 the District of Columbia, in the sense in which he uses that term, had been "incorporated into" the United States, the case from his view would clearly apply. He fails to inform us when or how it was so "incorporated," but he undoubtedly assumes it to be a fact. He then makes this criticism of Mr. Justice Brown's treatment of that case, saying:—

"To question the principle above stated, on the assumption that the rulings on this subject of Mr. Chief Justice Marshall in *Loughborough v. Blake* were mere *dicta*, seems to me to be entirely inadmissible."

Here four of the majority justices concede the authority of *Loughborough v. Blake*, and it clearly controls the *Downes* case unless it can be made to appear, not assumed, that the District of Columbia had at that time been "incorporated," and no single fact is stated that it is claimed even tends to show incorporation. In the absence of such showing the decision in the *Downes* case should be reversed. If the understanding of Congress were entitled to control, which fortunately it is not, it clearly had not been "incorporated," as in 1871 Congress passed an act extending the Constitution to the district, an idle ceremony if it had been "incorporated" into "the United States" for fifty years. To be sure, Mr. Justice Brown says this was done "to put at rest all doubts regarding the applicability of the Constitution," but our attention is not directed to anything in the act that indicates such a purpose, or in the facts connected with its passage. If this act had no real significance, how much significance is to be attached to similar legislation in connection with the territories, which is relied upon to answer the case that holds that the territories are a part of the United States, and that the Constitution was operative therein without the aid of legislation? The inconsistencies of the court lead them into difficulties whichever way they turn. It is submitted that the majority have not succeeded in escaping from the "embarrassment" of *Loughborough v. Blake*.

#### INSURANCE CO. *v.* CANTER.

The *Canter* case, which turned upon the power of the territorial legislature to create a court exercising admiralty jurisdiction, is erroneously supposed to establish the fact that the territories are not a part of the United States. This case is misquoted and misconceived. Mr. Justice Brown states that Mr. Chief Justice Mar-

shall held "that territory ceded by treaty becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or upon such as its new master shall impose." The context shows that this is a misapprehension, as Mr. Chief Justice Marshall was simply stating a general rule of international law as to which there is no question, and not the law of that case. He said:—

"*The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory become a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose.*"

That he did not state it as the law of that case is clear also from the fact that immediately following a full statement of these general principles, he refers to the fact that the treaty provided that "as soon as may be consistent with the principles of the Federal Constitution," the inhabitants of Florida "shall be incorporated in the Union of the United States; . . . and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States." Note the language, "*shall be incorporated,*" "*and admitted.*" Apparently all *to be done*, not a fact accomplished by the cession. The act of Congress creating the territorial legislature enumerated certain constitutional privileges and immunities which it conferred upon Florida. Mr. Whipple, in his argument, insisted that there was no occasion for this enumeration "if the inhabitants of Florida were entitled to them upon the act of cession," and Mr. Justice Johnson, in his opinion in the case in the circuit court, took the same view. Notwithstanding all this "the great Judge," speaking for a unanimous court, denied this contention and said:—

"This treaty is the law of the land, *and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.*"

Mark it, not the act of Congress, as was urged by counsel and Mr. Justice Johnson, but the "*treaty . . . admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.*" The fact that privileges and immunities were conferred by act of Congress is not even mentioned. When the inhabitants had all the "privileges, rights,

and immunities of citizens" they were clearly citizens, and if Mr. Chief Justice Marshall is correct they became such *by the act of cession*, and the territory was also "incorporated in the Union" by the same act, without the aid or consent of Congress. He expressly declines to pass upon the question as to whether "its new master" can "impose" terms, as in the next sentence he says:—

"It is unnecessary to inquire whether this is not their condition, independent of stipulation."

If "independent of stipulation" they acquired these constitutional rights, certainly, if Mr. Justice Brown's adhesive theory is sound, they could not be deprived of them by any terms "such as its new master shall impose," and it was not so held. Mr. Whipple and Mr. Webster both contended that the right of representation was the supreme test of incorporation and citizenship. Mr. Whipple said: "If the Constitution is in force in Florida, why is it not represented in Congress?" Mr. Webster said: "What is Florida? It is no part of the United States. How can it be? How is it represented?" This is Webster's only reason, and this remark is cited by Mr. Justice Brown, as well as by Mr. Justice McKenna, in the *De Lima* case, apparently as entitled to weight. It may be remarked in passing that at the most this was merely Webster's *argument* in the discharge of his professional duty, bound to make the most effective presentation of his client's case, and does not necessarily indicate his own opinion. The "great judge" clearly apprehended, however, the broad distinction which exists between civil rights and political rights, and that one by no means involves the other, as he denied this contention, and held that "they do not, however, participate in political power; they do not share in the government, till Florida shall become a state." He had just held that the inhabitants had all the "privileges and immunities" of citizens. Therefore representation was not one of them. The right of representation necessarily stands or falls with the right to the elective franchise, as they who cannot vote cannot be said to be represented. That citizenship does not involve the right of suffrage is well settled.

In *Minor v. Happersett*<sup>1</sup> the court held:—

"The word 'citizen' in the Constitution of the United States conveys the idea of membership of a nation and nothing more. Women are citizens of the United States. The right of suffrage is not one of the necessary privileges of a citizen of the United States. The United States

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<sup>1</sup> 21 Wall. 162, 1875.

Constitution did not add the right of suffrage to the privileges and immunities of citizenship as they existed at the time the Constitution was adopted. Suffrage was not coextensive with the citizenship of the states at the time of its adoption. It was not intended to make all citizens of the United States voters. The Constitution of the United States *does not confer the right of suffrage upon any one.*" *United States v. Cruikshank*,<sup>1</sup> *Murphy v. Ramsey*.<sup>2</sup>

What becomes then of Webster's only test? When his sole reason fails, how can his conclusion be sustained? There is much confusion of thought, and many erroneous conclusions are reached, by the failure to bear in mind this clear distinction. I notice that the advocates of legislative absolutism, while they do not deny this distinction, fail to make conspicuous, in the discussion of the insular questions, that the *only* question is one of *civil* and not of *political* rights. It is undoubtedly the popular impression that to hold that the Porto Rican, or the Filipino, is a citizen of the United States, is at once to vest him with the right of suffrage, and create a disturbing element in our political economy, when nothing could be further from the fact. The elective franchise is popularly supposed to be the distinguishing badge of citizenship, but it is not even one of the elements of citizenship of the United States. Voting, representation, and the consent of the governed, are not guaranteed by the Constitution of the United States, or involved in this discussion. This misapprehension, no doubt, contributes in a large degree to whatever popular support absolutism may have. It is akin, though much more general, to that other idea that so long as these possessions can be held as colonies, "territory appurtenant and belonging to the United States," "disembodied shades," in some way the possibility of states being created out of them is made more remote. But the fact is that the Constitution requires no intermediary, preparatory, or territorial stage for an intending state. It is equally as competent to create one out of Porto Rico as out of Oklahoma. Given a President, Senate, and House of Representatives of the same party, and if desired a "disembodied shade," by a mere act of Congress, becomes one or more sovereign states, the number limited only by political exigency. If our Democratic friends obtained power, and desired to intrench themselves therein on the line of free trade against protection, how long would it take them to bespangle the Orient with states? These are pleasing but inherent contingencies.

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<sup>1</sup> 92 U. S. 542.

<sup>2</sup> 114 U. S. 15.



Mr. Justice Brown seems to derive aid and comfort from the opinion of Mr. Justice Johnson in the *Canter* case in the circuit court, as does Mr. Justice McKenna in the *De Lima* case. Two propositions are cited from his opinion, and thought to be significant : —

First. The fanciful distinction between "territory acquired from the aborigines," also "by the establishment of a disputed line," and that which "was previously subject to the jurisdiction of another sovereign," the Constitution immediately attaching, it is supposed, to one and not to the other.

Second. The fact that certain "privileges and immunities" were "enumerated in the Act of Congress," showing that they were not acquired by treaty.

While the court reached the same conclusion as did Mr. Justice Johnson, his first proposition was entirely ignored, and his second, as we have seen, distinctly denied by the court. Inasmuch as Mr. Justice Johnson did not file any separate opinion, we must infer that he was satisfied with the reasoning of the court, and conceded his own reasoning to be wrong. Under these circumstances how can his opinion as to these points be relied on as an authority? Mr. Justice Brown states that the result of the *Canter* case is that Congress, when authorizing the creation of a territorial court, "must act independently of the Constitution, and upon territory which is not part of the United States within the meaning of the Constitution." He also says : "But if they be a part of the United States it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution." With all due respect to the learned justice, I submit that no such conclusion follows from that case, that it does not even tend to establish it, and that the decision does not necessarily show that Florida either did or did not become a "part of the United States" by the act of cession.

If it became a "part of the United States" by the act of cession, it is clear that the territorial legislature could pass no valid law that would be "inconsistent with the laws and Constitution of the United States." But the act of Congress creating the territorial legislature provided that "no law shall be valid which is inconsistent with the laws and Constitution of the United States," and Mr. Chief Justice Marshall expressly held that the powers of the legislature "were *subject to the restriction* that their laws shall not be inconsistent with the laws and Constitution of the United States," so that in either case, whether by act of cession, or by

act of Congress, the provisions of the Constitution equally controlled the territorial legislature. In either case, so far as the operation of the Constitution was concerned, this territory was to all legal intents and purposes a "part of the United States." It matters not how the Constitution reached the territory, so far as that case was concerned, so long as it was there. The court not only recognized the application of the Constitution by citing that provision of the act of Congress and expressly so declaring, but by holding after expressly examining that question that the judiciary clause of the Constitution *did not apply* to the territory. If the Constitution had not been operative the inquiry as to whether the judiciary clause applied to the territory would have been entirely unnecessary.

Notwithstanding the fact that Mr. Justice Brown thinks "it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution," that is precisely what the "great judge" held they could do. Instead then of holding that this territory was not a "part of the United States," the case proceeds altogether upon the theory that it was, and bound by the Constitution, but that the power exercised was not inconsistent with any of its provisions. This analysis disposes of the reflection which is made upon the court when Mr. Justice Brown says: —

"In delivering his opinion in this case Mr. Chief Justice Marshall made no reference whatever to the prior case of *Loughborough v. Blake*,<sup>1</sup> in which he had intimated that the territories were part of the United States."

"Intimated" is inadequate when characterizing an express declaration. He had no occasion to refer to that case, as in the opinion being rendered he had not even "intimated" either directly or indirectly the contrary. All of the territorial cases are based upon the *Canter case*, and they, therefore, have no more tendency to show that a territory is not "a part of the United States." As to this point they fall with it. My view of this case is not new, as Mr. Whipple contended for the legality of the court "to the same extent if the Constitution is, or if it is not, *per se* in force in Florida."

#### CROSS *v.* HARRISON.

It is submitted that *Cross v. Harrison* is inconsistent with and is virtually overruled by the judgment in the *Downes case*. It is

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<sup>1</sup> 5 Wheat. 317.

the only "case from the foundation of the government" where "the revenue laws of the United States have been enforced in acquired territory without the action of the President or the consent of Congress, express or implied." After the ratification of the treaty ceding the territory of California, and before any act of Congress, the duties prescribed by the general tariff laws were collected in California, and the principal question was whether the proceeding was legal. The court sustained it, saying on the precise point in question : —

"But after the ratifications of the treaty, California became a part of the United States, or a ceded, conquered territory."

As to the precise time they are more specific : —

"By the ratifications of the treaty, California became a *part of the United States*. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage."

*A fortiori*, then, was it "bound and privileged" by the Constitution, the supreme law.

It was not only contended that California was not "a part of the United States," but that as no collection district had been established the duties were illegally imposed. The court answered these suggestions construing the provision of the Constitution now under consideration, saying : —

"The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision of the Constitution which enjoins that all duties, imposts, and excises shall be uniform throughout the United States."

The case turned on this point, and the court felt that it had been demonstrated, as they said : —

"It having been shown that the *ratifications of the treaty* made California a *part of the United States*, and that as soon as it became so the territory became subject to the acts which were in force to regulate foreign commerce with the United States."

The court cited with approval a letter from Secretary Buchanan, containing this statement : —

"This government *de facto* will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land. For this reason no import duties can be levied in California on articles the growth, produce, or the manufacture of the United States, as no such duties can be imposed in any

other part of our Union on the productions of California, . . . for the obvious reason that California *is within the territory of the United States.*" . . .

This is the precise question involved here.

Bearing in mind that this was a unanimous opinion, these express declarations would seem to justify Mr. Justice White's cautious statement that the "opinion undoubtedly expressed the thought that *by the ratification of the treaty* . . . the territory had become a part of the United States," and would require some answer before a majority of one would be justified in rendering a judgment inconsistent therewith.

Mr. Justice Brown's method is to be commended for its ease. While he cites the case with approval in the De Lima case, in the Downes case he does not even refer to it. He simply ignores it. Mr. Justice White sees that this case is utterly inconsistent with his theory that a territory cannot become a part of the United States without "the express or implied assent of Congress," and makes an earnest effort to reconcile it.

He does not go so far as to assert that the fact that the treaty "accomplished the cession, *\*by changing the boundaries of the two countries,*" in other words, "*\*by bringing the acquired territory within the described boundaries of the United States,*" may have had some weight, but so intimates. It cannot be soberly contended that by the simple expedient of running a line by description around a territory, the treaty-making power can make that territory a part of the United States, when by describing the process as an annexation it would be beyond their constitutional power to thus incorporate it. By indirection they would be able to easily work direction out. Of such a principle it could be well said, "I am become as a sounding brass or a tinkling cymbal." To hold that in using such language there was any purpose, other than convenience of description, is to impeach the intelligence of those who were responsible for the treaty. His propositions are, —

First: "After the ratification of the treaty various laws were enacted by Congress, which in effect treated the territory as acquired by the United States, and the executive officers of the government, conceiving that these acts were an implied or express ratification of the provisions of the treaty by Congress, acted upon the assumption that the provisions of the treaty were thus made operative, and hence incorporation had become efficacious."

Second: Inasmuch as the law contained no intimation as to ratification, and the executive officers acted before they were

passed, another hypothesis was necessary. He says "that as the treaty provided for incorporation in express terms, and Congress had acted without *repudiating it*, its provisions should be at once enforced." This proposition, shorn of its rhetoric, is: First: Territory cannot be incorporated without the consent of Congress; second, the consent may be express or implied; and, third, it may be assumed if the treaty is not repudiated. Whatever else may be said of this, its convenient, flexible, and universal character must be conceded, as no state of facts can be conceived that would be inconsistent with its application. A proposition of this character is necessary to answer *Cross v. Harrison*.

After having stated that the treaty "included the ceded territory within the boundaries of the United States, but also expressly provided for incorporation," Mr. Justice White says: "The decision of the court . . . undoubtedly took the fact I have first stated into view." That is of course possible, but it is absolutely certain that the opinion does not contain a line or word that sustains the suggestion. While other treaties were discussed in the opinion and by counsel (the original briefs are not on file), there is not the slightest intimation that in this particular any distinction was made between the treaty under discussion and the other treaties. Its peculiarity as to "boundaries" and "incorporation," now so absolutely essential to a correct conclusion on the new theory, are not even mentioned, and the discussion was elaborate and exhaustive. Moreover, the treaty did not provide for immediate "incorporation in express terms," as is thought. Inasmuch as Mr. Justice White does not quote the article relating to incorporation, I give it here in connection with the similar clause in the treaties ceding Florida and Porto Rico, and in their order.

FLORIDA TREATY. Feb. 22, 1819.

ARTICLE VI.

"The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

TREATY WITH MEXICO. Feb. 2, 1848.

ARTICLE IX.

"The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what

is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted, *at the proper time (to be judged of by the Congress of the United States)*, to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution, and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

TREATY OF PARIS. April 11, 1899.

ARTICLE IX.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

The Mexican treaty, it will be seen, does not attempt immediately *by the treaty* to incorporate the territory into the Union; it expressly remits that question to Congress. "Shall be incorporated into the Union of the United States and be admitted," — when? Now, at once? No. "*At the proper time.*" By whom? Who is to determine the time? ("To be judged of by the Congress of the United States") — "to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution" — "and in the mean time," that is, until "incorporated" by the Congress, "shall be maintained and protected," etc., clearly postponing citizenship. In what substantial respect does this differ from the like clause in the Treaty of Paris? In the Paris treaty, civil rights were to "be determined by the Congress." In the Mexican treaty they were to be "admitted to" those rights when Congress should so judge. Notwithstanding the express reference of those questions to Congress by the treaty, the court held that "*by the ratification of the treaty* California became *a part of the United States.*" No good reason has been shown why the same result did not follow from the same facts in the case of Porto Rico.

Charles E. Littlefield.

[To be continued.]

## THE RIGHTS OF FOREIGNERS TO RESIDE AND HOLD LAND IN CHINA.

IT is a well-settled principle of international law that every nation has the liberty to grant to foreigners only such rights concerning real property as it may deem proper ; that, in the absence of statute or treaty regulating the subject, an alien has no absolute right to hold land. In the treaties with other nations, China has granted to the citizens of those countries residing or sojourning at the treaty ports certain well-defined rights and privileges. It has been claimed, however, by the foreign missionaries in China, that by virtue of certain provisions in existing treaties they have the right to acquire land and to establish permanent missions throughout the interior. In order to understand the nature of these claims and see upon what ground they are based, it is necessary to examine the treaties and see what concessions have been made to the citizens of foreign countries generally, and what additional rights, if any, have been granted to the missionaries.

The treaties of 1844 and 1858, between the United States and China, are acts *in pari materia*, and while the latter contains certain modifications and extensions, it is substantially a reaffirmation of the treaty of 1844. In the treaty of 1858, commonly known as the treaty of Tien-tsin, it is provided in Article XII. : " Citizens of the United States residing or sojourning at any of the ports open to foreign commerce, shall be permitted to rent houses and places of business, or hire sites on which they can themselves build houses or hospitals, churches and cemeteries. The parties interested can fix the rent by mutual and equitable agreement ; the proprietors shall not demand an exorbitant price, nor shall the local authorities interfere, unless there be some objections offered on the part of the inhabitants respecting the place." In Article XXIX. it is provided that, " Any person, whether citizen of the United States or Chinese convert, who according to these tenets shall peaceably teach and practice the principles of Christianity, shall in no case be interfered with or molested." Article VI. of the supplemental treaty of 1868 provides : " Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation ;"

while Article VII. adds: "The citizens of the United States may freely establish and maintain schools within the empire of China at those places where foreigners *are by treaty permitted to reside.*"<sup>1</sup>

The passages quoted are the principal provisions in the treaties between the United States and China that have any direct bearing upon the subject under consideration. There is no provision whatever in these treaties granting American citizens the right to purchase land<sup>2</sup> either at the treaty ports or in the interior; nor is any right conferred upon missionaries to lease or purchase land, or to reside, in the interior.<sup>3</sup>

It has been claimed on behalf of the American missionaries<sup>4</sup> that under the sixth article of the French treaty of 1860, and the twelfth article of the British treaty of 1858, the missionaries of those countries are given the right to acquire land and to reside in any of the provinces of China; and that, being entitled under the most favored nation clause to all the rights and privileges accorded to the missionaries of those countries, American missionaries also have the right to acquire land and to reside in the interior. After the occupation of Peking by the French and English in 1860, certain modifications were made in the French treaty of 1858, and among other changes was the insertion of the celebrated Article VI. In the Chinese text of the treaty the last sentence of this article reads as follows: "It is in addition permitted to French missionaries to rent and purchase land in all the provinces, and to erect buildings thereon at pleasure."<sup>5</sup> The words

<sup>1</sup> *Treaties and Conventions between the U. S. and For. Powers*, pp. 162, 168, 181.

<sup>2</sup> It will be noticed that Article XII., quoted above, only gives the right to *lease* land in ports open to foreign commerce. The custom, however, has been to make the lease perpetual, and this practically serves the purpose of an estate in fee simple.

<sup>3</sup> In the treaties of 1858 with Great Britain, France, and Russia, China has granted to the citizens of those countries the right to travel in the interior on passports, and by implication they have the right to sojourn temporarily at their convenience. *Sen. Doc. 30, 36th Cong. 1st Sess. vol. x. pp. 390, 396, 412.* But the privilege of sojourning a reasonable time at any place in the interior would not, by implication, create the right to purchase property and establish a permanent residence there. *For. Rel. 1882, p. 140.*

<sup>4</sup> With the exception of the amended Berthemy convention (see *post*, p. 205) the treaties do not confer upon missionaries any greater rights than are granted to traders, travellers, or any other class of citizens; as a matter of fact, however, while merchants of all foreign nations confine their business to the open ports as prescribed by the treaties, the missionaries have extended their operations far beyond the treaty limits, have purchased land, and have built houses, churches, and hospitals throughout the empire.

<sup>5</sup> *For. Rel. 1885, p. 149.*



quoted are not found in the French text of the article, nor is there any similar provision in any part of the French treaty. It is not definitely known how the words came to be inserted in the Chinese version. The clause in question confers no rights, however, since the treaty provides that in case of disagreement about the interpretation to be given the language, the French text must prevail.<sup>1</sup> Moreover, the provision has never been adopted under the favored nation clause of any foreign power, nor has France ever claimed that it constituted part of the treaty.<sup>2</sup>

Article XII. of the British treaty of 1858 provides that "British subjects, whether at the ports *or at other places*, desiring to build or open houses, warehouses, churches, hospitals, or burial grounds, shall make their agreement for the land or buildings they require, at the rates prevailing among the people equitably, and without exaction on either side."<sup>3</sup> It seems that the phrase, "whether at the ports or other places," was inserted in the treaty by the British because of the restrictions to which foreigners had been subjected in obtaining land in Canton. The provision has been construed by the government of Great Britain to mean places near or adjoining the open ports, and hence not to give British subjects unlimited right to settle in the interior. Under this clause foreigners have been permitted to reside outside of the walls of Canton and also at the suburban cities of Taku, Woosung, Whampoa, and Sicawei.<sup>4</sup> Our ministers at Peking have often been consulted by missionaries regarding the stipulations in the British and French treaties, especially the latter, and they have repeatedly stated that those conventions do not grant the missionaries any right to purchase land or to reside beyond the limits of the treaty ports. In a number of instances the Department of State has expressed its approval of the view taken by its diplomatic representatives.<sup>5</sup>

Having seen that our government has conceded that these treaties confer no legal rights on American citizens to secure property beyond the open ports, we naturally inquire what has been the attitude of the Chinese government regarding the rights of missionaries in the interior. The policy of the imperial government,

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<sup>1</sup> For. Rel. 1875, p. 335; For. Rel. 1886, p. 96; For. Rel. 1888, p. 271.

<sup>2</sup> For. Rel. 1888, p. 271.

<sup>3</sup> Sen. Doc. 30, 36th Cong. 1st Sess. vol. x. p. 413.

<sup>4</sup> For. Rel. 1881, pp. 284, 290.

<sup>5</sup> For. Rel. 1873, part 1, p. 119; For. Rel. 1875, part 1, pp. 334, 398; For. Rel. 1881, p. 290; For. Rel. 1882, pp. 137, 140; For. Rel. 1886, p. 96; For. Rel. 1887, p. 161; For. Rel. 1888, pp. 220, 238, 266, 270, 301; For. Rel. 1893, p. 234.

so far as it can be ascertained from the discussion of cases that have arisen from time to time, is to interpose no objection to the acquisition of property by the missionaries, provided no objection is raised by the local authorities or the inhabitants of the locality concerned.<sup>1</sup>

The custom has been for the local governments to apply the same rules, regarding the acquisition of land in the interior, as obtain at the treaty ports. While the treaties recognize the right of the local authorities, in some instances, to restrict the acquisition of property, our government will not permit unreasonable objections to be raised or improper regulations to be insisted upon.<sup>2</sup>

<sup>1</sup> A recent case bears directly upon this point. In 1893 the missionaries at Nanking desired to have the privilege of residing during the summer months at the hills adjacent to the city. They constructed huts, and with the consent of the owners of the land prepared to live there; but the viceroy, hearing of the intention, refused his assent, claiming that outside the city their lives would be in danger and that they would be beyond the reach of his protection. The Tsung-li Yamen, in a communication to the United States minister sustained the viceroy in the position taken by him, and quoted with approval a letter written by him to the Yamen which read as follows:—

"As China has authorized the building of churches and the propagation of Christianity *in the interior*, there would seem to be no reason in prohibiting to missionaries the simple privilege of resorting to certain places to escape the heat. The real reason, therefore, is to be found in the fact that the conditions are not the same within and without the capital. The mountain to which the missionaries wish to resort is desolate and retired, and few people live there. Since the building of churches at Nanking to the present time missionaries have never repaired to the mountains during the summer, and there is no provision in the treaties authorizing them to do so. Throughout the Yangt-zu Valley the popular mind is in an unsettled condition. Between the populace and the missionaries exists a great antipathy. Even within the cities where churches are protected by the magistrates, the suspicions of the people sometimes lead to trouble. If at some remote locality in the hills, the local officials would with difficulty learn of such troubles and would more than ever be unable to afford protection. . . . Now it is to be remarked that the missionaries in this case live in a locality in the northern part of Nanking which is half city, half suburb. It is quiet and pleasant to live in, not crowded and confused, and free from turmoil. Why should they under these circumstances search for other summer residences in the hills, causing endless trouble?" For. Rel. 1894, pp. 141, 143.

<sup>2</sup> It will be seen by referring to Article XII., quoted above, that the local authorities shall not interfere in a sale of land "unless there be some objection offered on the part of the inhabitants respecting the place." In 1853 (there is a similar provision in Article XVII. of the treaty of 1844) the Chinese officials insisted that the objection of a single person in the community would prevent the local authorities from determining the site for a building; but our government protested against so narrow an interpretation of the treaty. House Doc. 123, 33d Cong. 1st Sess. p. 78. In 1893 the Chinese authorities at Nanking, in a communication to the United States consul, stated:—

"Henceforth when missionaries or other citizens of the United States desire to

Experience has shown, however, that the religious and local prejudices of the inhabitants must always be taken into consideration in determining whether the objections of the local authorities are reasonable. One of the greatest obstacles met with in acquiring property in China is the superstition regarding geomantic influences, one of the oldest and most potent of all Chinese superstitions; it has frequently happened that riots have been brought about because of the alleged interference with the feng shui.

There seems to be a universal custom for the missionaries in the interior to take the legal title of the land in the name of a Chinese convert, who holds the property in trust for the missionary society. There is apparently a general belief that this method of acquiring and holding property does not offend the treaty stipulations, and that it is therefore valid. In 1888 our minister, on being consulted by a missionary regarding the force and effect of such a conveyance, replied: "The subject of trusts is one of the most difficult. In China it seems to be usual with foreigners, in the interior at least, to have property conveyed to a trustee who executes, as a precaution, a declaration of trust to the *cestui que trust*, which is not recorded. The plan is probably legal. But the better plan would, in my opinion, be to have the deed made to the head of the mission in trust for his society, or to the society direct."<sup>1</sup> The law of real property being governed by the *lex loci rei sitæ*, our equitable doctrine of trusts can have no application whatever in the empire of China; moreover, a trust created for the purpose of evading a rule of law would be clearly illegal and void even in this country. There can be no valid objection, however, to a Chinese missionary acquiring and holding land in his own name, even though the local officials and the inhabitants object to his presence.<sup>2</sup>

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acquire land or houses, no matter where, they must first meet the gentry and elders of the place, and agree with them, and then report to the bureau of local officials for an official survey of the ground."

The effect of this rule would have been to make the acquisition of land very difficult, if not absolutely impossible. Our minister directed the consul to inform the Taotai that the restrictions which they desired to impose were so directly in conflict with Article XII. of the Tien-tsin treaty that it would not be acquiesced in or acted upon by the legation. For. Rel. 1893, p. 230. It is interesting to note, in connection with this case, that Nanking is not an open port. Our government has also insisted that when the owner is willing to sell and the local authorities consent to the transfer, then the conveyance should be made regardless of the opposition of a few of the gentry. For. Rel. 1889, p. 73.

<sup>1</sup> For. Rel. 1888, p. 274.

<sup>2</sup> In 1881 a Chinese teacher was sent by the American missionaries to the city of

While, therefore, the treaties mentioned confer no right to acquire land in China, it nevertheless appears that, without objection on the part of the Chinese government, in practice missionaries purchase or lease property, either in their own names or in the name of a convert, in the interior as well as in the treaty ports. We now come to the question of indemnity where the foreigner, after having been permitted to purchase property in the interior, has been expelled by mobs and his property destroyed. The policy of the government of the United States in such cases may be briefly stated as follows: While the government has never advanced the claim that its citizens have any right to reside beyond the treaty ports, yet whenever American missionaries have located in the interior and have acquired property with the consent and acquiescence of the local officials and the inhabitants, our government has insisted that they shall not be deprived of their property without due process of law and just compensation. To illustrate the treatment of this class of cases and the result reached, two instances of recent date are in point.

The American Methodist mission was established in 1882, and property was purchased in the city of Chungking the next year. In 1886 additional property for a hospital, a school, and residence was purchased with the full knowledge and consent of the people and the local authorities. The deeds were sealed by the magistrate, and proclamations were issued stating that the mission intended to build. While the buildings were being erected the magistrate requested that the work should temporarily cease on account of the presence of a large body of military students caused by the military examinations. The property was turned over to the magistrate with the understanding that he was to be responsible for its protection. Inflammatory placards were posted by the students calling on the people to destroy the buildings, and two days later all the missionary property in Chungking was destroyed. A fine Catholic cathedral, just completed, and extensive foreign residences were consigned to the flames. The missionaries and families escaped from the buildings, and after some difficulty reached the Yamen, where they were given protection. After the

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Nan-Chang-fu, the capital of the province of Kiangsi. He leased premises just outside the city gates and began work. The inhabitants soon raised objections to his presence, and, after trying in vain to persuade him to leave, they finally put his furniture in a boat and sent him with it down the river. The incident was made the subject of a diplomatic remonstrance, our minister referring the foreign office to Article XXIX. of the treaty of Tien-tsin. For. Rel. 1881, p. 308.

immediate danger had passed, they were escorted to boats and allowed to leave the city. It clearly appeared from the evidence that the local officials took no precautions whatever to check the impending riot, and during its progress, for two days, nothing was done to quell it. It was only when the destruction of the city seemed imminent that any efforts were made to resist the acts of the mob. The United States demanded a large indemnity, which was paid by the Chinese government. The missionaries were permitted to return to Chungking, and under the protection of the authorities, to rebuild, where it was deemed advisable ; but in those localities where the opposition of the inhabitants was very great, the sites were exchanged for others.<sup>1</sup>

In 1887 the Presbyterian mission sought the aid of the local officials at Chi-nan-fu in securing ground for a hospital. The governor, to whom the matter was referred by the Taotai, replied that the officials could neither purchase property for the missionaries nor compel the people to sell, but if both parties mutually agreed to a transfer, the conveyance could be completed, and if any opposition arose, it would be suppressed. The missionaries took a perpetual lease of a piece of property and took the deed to the magistrate to be stamped, but he declined to seal it until the property was vacated. Some time later the literati and gentry, headed by a former governor of the province, presented a petition objecting to the lease as a violation of the treaty, and because it would interfere with the geomantic influence. After several interviews with the officials, the missionaries at their request agreed to wait thirty days to allow the officials to procure satisfactory property in exchange for the piece selected. But no offer of exchange was ever made. The landlord's family having agreed that the missionaries might take possession of the property, they notified the Taotai that the time having expired, one of them would go that evening and take charge of it, and a request was made that the magistrate be ordered to protect the occupant. In the evening a missionary went to the property, and in a short time a mob gathered about the premises. He was forcibly ejected from the house and severely injured by being stoned and otherwise maltreated. In an interview with the Taotai the missionaries were informed that the opposition was so great that it was impossible to suppress it, and that all they could do would be to accept back again their money which awaited them in the magistrate's Yamen. Our minister, in

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<sup>1</sup> For. Rel. 1887, pp. 159, 160, 163, 165, 166, 169, 176, 179, 180, 189, 207.

a communication to the Tsung-li Yamen, demanded that the possession of the leased property be accorded to the missionaries and protection in its occupancy be assured them ; but that if it was more desirable to make an exchange of property, then a suitable and satisfactory tract of land should be tendered to them. The missionaries were willing for an exchange of property, but the Chinese officials excused themselves by saying that they could find no land for sale. But as it appeared that large sums of money were extorted from the landlord who leased the property to the missionaries, that he was repeatedly beaten, stoned, and imprisoned, and that when taken out of prison two years later he soon died as a result of the inhuman treatment to which he was subjected, it is not at all surprising that there was no land for sale. The American minister, in a communication to the Tsung-li Yamen, stated that there would be no difficulty in purchasing land in the suburbs ; that it was only necessary that a guaranty be given of protection, and that there would be no maltreatment or imprisonment of a vendor. The imperial officers replied that the Yamen would address the provincial authorities and direct them to render assistance in devising a plan of action, but that if property could not be acquired at once the missionaries would have to be patient, "and wait and not show a hasty temper." Diplomatic correspondence on this subject continued for several years ; it would only be repetition to discuss this matter in detail. The imperial and provincial authorities seemed willing that the missionaries should be granted other property, but it was impossible to overcome the opposition of the inhabitants. In 1891 our minister's patient and persistent efforts were at last rewarded, the mission being granted another site within the city limits ; it was, however, expressly stipulated that, in order to preserve the geomantic influence, no ditch should be dug out, and that no high storied buildings should be erected.<sup>1</sup>

It is important to notice in this connection that in neither of the two preceding cases was there any objection interposed by the government of China to the demands of our government on the ground that the missionaries had exceeded their rights under the treaties.<sup>2</sup> Not only has China failed to insist that the mission-

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<sup>1</sup> For. Rel. 1888, pp. 238, 243, 266, 292, 309, 325, 349 ; For. Rel. 1899, pp. 72, 74, 108 ; For. Rel. 1890, pp. 155, 158, 160, 179, 192, 197, 206, 208 ; For. Rel. 1891, pp. 353, 431, 434, 451, 454 ; For. Rel. 1892, pp. 70, 71, 73, 89, 118.

<sup>2</sup> With the exception of the statement of the Tsung-li Yamen that there was no provision in the treaties authorizing the missionaries at Nanking to go to the moun-

aries confine their actions within the rights granted by the treaties, but the enormous and often exorbitant and unreasonable indemnities demanded by the United States for injuries done to American missionaries in the interior have invariably been paid without any question being raised as to the liability of the imperial government. Thus in 1873 the Rev. Corbett, an American missionary in Chi-mi, a city located in the interior, 130 miles from any treaty port, leased property for a residence and began work. A short time after his arrival he "began to feel the effects of the native opposition, being twice stoned and hooted out of the neighboring villages." He was finally compelled to flee to the nearest treaty port for protection. After he had gone, some one entered and sacked his house. The American minister demanded that the imperial government take action in the matter, and the nearest consul made a complaint to the local authorities; but no satisfactory progress having been made toward a settlement our minister directed the consul to go in person to the port of Chefoo "to bring the affair to a conclusion according to the obligation of the treaty and justice." An American naval vessel was sent to Chefoo, where it remained until the affair was satisfactorily settled. Twenty-eight of the rioters were arrested and with a number of witnesses taken from the scene of the disturbance at Chi-mi to Chefoo, a distance of 140 miles, where the trial took place. Four of the rioters who had been prominently engaged in the stone throwing were severely punished, while the local constables, in addition to suffering severe corporal punishment, were dismissed from office. All of the prisoners were obliged to enter into a bond to keep the peace, and to guarantee Mr. Corbett personal safety while he remained at Chi-mi. The Taotai issued a proclamation threatening severe punishment for similar attacks in the future. Mr. Corbett was indemnified for his pecuniary loss, was given a special passport, and also a letter to the Chi-mi magistrate.<sup>1</sup>

One cannot but compare the justice insisted upon by our government in this case with the position taken by our own government when asked for indemnity in such cases. It will be

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tains during the summer, the writer has been unable to find a single instance where the imperial government has ever objected to the presence of the missionaries in the interior, or even alluded to their rights under the treaties. As we have already seen, the objections in the Nanking case were based on the reasonable ground that it was impossible to afford the missionaries any protection if they resided in the mountains; but for the antipathy of the inhabitants the question would probably not have been raised.

<sup>1</sup> For. Rel. 1874, pp. 274, 297, 345.

remembered that in September, 1885, a riot occurred at Rock Springs, Wyoming, and twenty-eight Chinamen were killed and many more severely injured. It appeared that the Chinese miners refused to join with the other miners in one of their "strikes," and while quietly at work one morning, they were suddenly attacked by an armed mob. They were ordered to leave the neighborhood, but before they had an opportunity to obey the mob opened fire upon them. All who were able fled to the mountains without offering any resistance. Many were murdered in their homes, and others were shot down while endeavoring to escape. The rioting continued all day without any effort being made by the local authorities to suppress it. During the entire night the reports of rifles and revolvers could be heard, while the surrounding hills were lit with the glare of the burning Chinese village. It is not necessary to review the sickening details of the massacre; the history of civilized nations does not present a more shocking example of brutal cruelty and inhumanity. The proceedings before the grand jury were described as a "burlesque." Although nearly all the murderers were known, the jury failed to find any bill of indictment. Regarding the coroner's proceedings the Chinese minister stated: "The conduct of the coroner who investigated the causes of death seems to be strange, but with my imperfect knowledge of American procedure I prefer not to criticise it." Minister Cheng Tsao Ju, in a note to the Department of State, demanded that the guilty parties be brought to punishment; that the Chinese subjects be indemnified for all losses and injuries sustained; and that proper measures be taken to prevent similar attacks. Secretary Bayard in reply advanced the well-known argument which has often been put forward by our Secretaries of State; that is, that under our Constitution the federal government cannot interfere with the administration or execution of the local laws of a state or territory; that the territorial courts were open, "with every aid they can devise, to secure publicity and impartiality in the administration of justice to every human being found within their jurisdiction." He then went on to say:—

"Yet I am frank to state that the circumstances of the case now under consideration contain features which I am disposed to believe may induce the President to recommend to the Congress, *not as under obligation of treaty or principle of international law*, but solely from a sentiment of generosity and pity to an innocent and unfortunate body of men, subjects of a friendly power, who, being peaceably employed within our jurisdiction, were so shockingly outraged; that in view of the gross and shameful



failure of the authorities at Rock Springs, in Wyoming Territory, to keep the peace, or even attempt to keep the peace, or to make proper effort to uphold the law, or punish the criminals, or make compensation for the loss of property pillaged or destroyed, it may reasonably be a subject for the benevolent consideration of Congress."

In endeavoring to express his sympathy for the unfortunate families he names the very elements which, according to well-recognized principles of international law, make a nation liable for mob violence. The learned Chinese diplomat observed that if the view taken by our Secretaries of State as to the liability of the United States for mob violence should be insisted upon and adhered to by our government, then "China should, in due reciprocity and international comity, accept and practice the same principle."<sup>1</sup>

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<sup>1</sup> For. Rel. 1886, pp. 101-168. In 1858 the government of the United States and China agreed upon a convention which provided for an adjustment of all claims of American citizens against China. Under an act of Congress two citizens of the United States were appointed to adjust the claims and award such sums as they might deem proper. The Chinese government requested that a Chinese be placed on the Claims Commission; but this proposition was rejected, and no opportunity was afforded the government of China to examine the evidence upon which the claims were based. It may be interesting in this connection to notice the nature of some of the claims that were allowed, not that they bear directly upon the question of liability for injuries committed in the interior, but because they illustrate how far our government has followed the "principles of international law and the usages of national comity."

Our government has always maintained that according to well-settled rules of international law, it is not liable to either foreign governments or individuals for damages resulting from the war operations of either its own troops or of foreign nations; and other nations have invariably followed this rule. But the American Commission allowed forty-one out of forty-eight claims for damages sustained by American citizens resulting from the bombardment of Canton by the British in 1856 and 1857, China paying \$397,618.17 as "war damages." For. Rel. 1886, p. 145. In 1841 an American citizen was arrested by Chinese soldiers, during the war between Great Britain and China, under the mistaken belief that he was a British subject. He was thrown into prison and cruelly treated; but when it was discovered that he was an American citizen he was immediately released, with an apology from the Chinese authorities. He was imprisoned less than a day, but the claim of \$31,600 was allowed by the Commission. For. Rel. 1886, p. 146. Another interesting case was the "Caldera" claim. The Caldera was a Chilian vessel, but the claim was made by New York underwriters. It appeared that the vessel encountered a severe typhoon on the first day out from Hong-Kong, and being badly damaged, she sought shelter in a bay. It was only with difficulty that the vessel could be kept from sinking. While the crew were engaged at the pumps they were attacked and overpowered by Chinese pirates who carried away a large part of the cargo. The vessel proved a total loss. It is expressly stipulated in the treaties of 1844 and 1858, that the Chinese government will not make indemnity for American vessels wrecked or plundered by pirates. Piracy was one of the risks against which the claimants insured; it would have been as reasonable to have demanded an indemnity for the damage caused by the typhoon. The Commis-

Whether the Chinese government could have successfully maintained that it was not liable for injuries done to property acquired in excess of treaty rights is, perhaps, an arguable question; but it may be safely said that, under similar circumstances, no Western nation would ever have failed to avail itself of this defence.<sup>1</sup> Had the question of liability been raised it would seem, however, that the imperial government, by sanctioning the acts of the local officials, would be precluded from maintaining that the local authorities exceeded their powers and that the sale was invalid. It must of course be conceded that the unauthorized acts of the local authorities could not bind the imperial government, any more than our municipal officials could bind the federal government by granting rights in excess of existing treaties. But the relation between the national and the local government in China is very different from what it is in this country; in China the local officials are directly under the control of the imperial government, and the subordinate officers may be regarded, in a general way, as the official agents of the national government. The instances are numerous where the local and provincial officers have been subjected to severe corporal punishment by the imperial government for injuries done to American citizens.<sup>2</sup> The fact that for more than forty years there has been a universal custom of selling lands to foreign-

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sion allowed \$54,566.14. Sometime later the claimants demanded of Minister Burlingame the further sum of \$68,078.67. Mr. Burlingame stated that it was his opinion that "they were not entitled to one farthing. . . . After this award to learn that a still further claim should be put forward fills me with amazement." For. Rel. 1886, p. 146; For. Rel. 1865, part 2, p. 408. In discussing these claims Minister Cheng Tsao stated: "It results that the total amount received by claimants out of the indemnity fund paid to the United States by China, by virtue of the Claims Convention of 1858, was \$643,994.42; of which amount it is believed that at least \$600,000 was not warranted under a strict application of international law, as interpreted by the government of the United States, but was conceded by China as a mark of appreciation of the friendly attitude of the United States during the hostilities with Great Britain and France." For. Rel. 1886, p. 147.

<sup>1</sup> Apropos of this question of liability, Minister Low, in discussing the rights of missionaries, stated:—

"There is no authority under the treaties for citizens of the United States to purchase land outside the limits of the treaty ports. If property be purchased and buildings erected thereon, and they should be damaged or destroyed by mob or other violence of the Chinese, the claim for damages would be an equitable rather than a legal one; and if the local or the imperial authorities should refuse to respond, upon the ground that the property was purchased in violation of treaty rights, it is extremely doubtful if our government would sanction any proceedings which might be instituted by its diplomatic or consular officers to collect it." For. Rel. 1873, p. 339.

<sup>2</sup> For. Rel. 1881, pp. 266, 268; For. Rel. 1891, p. 73; For. Rel. 1895, pp. 103, 151, 157, 162; For. Rel. 1897, p. 68.

ers with the tacit acquiescence of the imperial government tends to prove that the acts of the local officials were authorized by the national government; in fact, the imperial government has repeatedly directed the provincial authorities to aid the missionaries in procuring land, and also commanded that proper protection be given them.<sup>1</sup>

It has been suggested by one of our ministers that the attitude of the Chinese government has been such that it may be considered as equivalent to an actual recognition of the right to reside in the interior.<sup>2</sup> It is extremely doubtful if this proposition can be maintained. The fact that China has granted to foreigners greater rights than they are entitled to under the treaties does not in itself create a positive right to continue to acquire rights other than those granted by treaty. There are instances where nations have not insisted on the fulfilment of treaty obligations, and even after the elapse of a long period of time, they have changed their policy and successfully enforced their rights under the treaties. It is clear, however, that a foreigner may, with the permission of the government, acquire privileges not authorized by treaties, and the government would be estopped from saying that he acted in violation of his legal rights, or from depriving him of rights thus obtained. But that would be no ground for asserting the claim that other foreigners are entitled to acquire similar rights; for while a government may grant to certain individuals such rights as it may see fit to concede, it does not necessarily follow that a right to acquire such rights is thereby created in favor of the whole world. Where there is a general custom of granting certain privileges to the citizens of a particular nation, other countries may rightfully claim that, under the most favored nation clause, they are entitled to the same rights; but that is, of course, an entirely different proposition.

The right of extra-territorial jurisdiction as exercised by foreign nations in China is an element which has greatly affected the right to reside in the interior. For the fact that foreigners are amenable only to the consular tribunals of their own country makes it necessary to restrict their residence to the open ports where consuls are stationed. Our citizens in China are not noted for their fair dealing with the Chinese, and our consular tribunals do not always ren-

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<sup>1</sup> For. Rel. 1881, p. 271; For. Rel. 1887, p. 164; For. Rel. 1888, pp. 294, 295; For. Rel. 1895, p. 162.

<sup>2</sup> For. Rel. 1882, p. 141.

der decisions with perfect impartiality;<sup>1</sup> it is therefore not at all surprising that China should object to an extension of the system throughout the empire.

But the reasons for restricting other foreign classes to the open ports do not apply with equal effect to the missionaries. And it is perhaps because the principles of the Christian religion are recognized by the Chinese government, "as teaching men to do good, and to do to others as they would have others do to them," that the missionaries have not only been permitted to exceed the limitations prescribed by the treaties, but they have also been granted, in recent years, new treaty rights not accorded to any other class of foreigners. In an amendment to the French treaty in 1895 the French missionaries were granted certain important rights and privileges in the interior. Under the most favored nation clause our missionaries are, of course, entitled to the same rights and privileges. It has been the custom of our government to insert in its official publications copies of all treaties between China and other nations; but, strangely enough, the amended Berthemy convention has never been published. The writer recently applied to the Department of State for a copy of this treaty. In reply the Department stated that there was no copy of the treaty in Washington; that in accordance with instructions from the government the American Ambassador in Paris had consulted M. Delcassé, Minister of Foreign Affairs, regarding the treaty, but that because of reasons based on policy the French government had declined to publish it. Being unable to procure a copy of the treaty, the Department sent a copy of a document which appears in the official publications of the French diplomatic correspondence. This docu-

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<sup>1</sup> The Hon. C. W. Bradley, LL. D., in one of his decisions used the following language: "It is a mortifying fact that were a balance to be struck between the aggregate losses suffered by Americans from Chinese pirates, Chinese thieves, and debtors, on the one hand, and on the other, the injuries inflicted on Chinese merchants, traders, compradors, and citizens in the non-payment of debts honestly due them by American merchants, agents, shipmasters, mariners, etc., we should find that balance to our debt in a ratio of full 90 per cent. I speak advisedly. On the score, too, of official fidelity and punctuality in fairly carrying out their treaty obligations as against their own countrymen, I apprehend that the consular officers of America and Europe have been guilty of as many and as serious laches as can be produced against the native magistracy of China in their official shortcomings toward foreigners. Such, at least, is the result of my observation. Due provision is also made by the Chinese code of statutes and ordinances for the punishment of malfeasance on the part of officers. . . . These statutes cover the whole ground of official torts, and are frequently enforced with exemplary impartiality and vigor." H. Ex. Doc. 29, 40th Cong 3d Sess. p. 176.

ment, which is an official communication to the French government from its diplomatic representative in Peking, explains something concerning the nature and substance of the amended treaty.<sup>1</sup> By virtue of the amendment the French missionaries are given the right to purchase land and reside anywhere in the interior. The convention provides that the deeds taken by the missionaries shall be in the name of the missionary society or church which buys the land. (For. Rel. 1897, p. 62.) It seems that until very recently there was in force in certain parts of the empire a regulation which had the effect of adding a new clause to the treaty. It required every Chinaman, before selling any property to the missionaries, to obtain from the local authorities permission to make the sale. The French Legation protested against the regulation, and the Tsung-li Yamen caused a proclamation to be issued which stated that the vendor shall neither be obliged to inform "the local authorities of his intention to sell, nor to ask their authorization in advance." According to the terms of the official letter quoted in the note below<sup>1</sup> it would seem that the additional rights granted by the amended treaty are restricted to the Catholic missionaries exclusively; but whether that is true or not, it does not appear that the Chinese government has, as a matter of practice, ever made any distinction between Catholics and Protestants.

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<sup>1</sup> M. GERARD, MINISTRE DE LA REPUBLIQUE FRANÇAISE À PEKIN, À M. HANOTAUX, MINISTRE DES AFFAIRES ÉTRANGÈRES.

PEKIN, le 30 avril 1895.

J'ai reçu la dépêche par laquelle Votre Excellence a bien voulu répondre à la suggestion que je lui avais soumise concernant l'opportunité de donner à la Convention conclue le 20 février 1895 entre M. Berthemy et le Tsong-ly-Yamen, une consécration et une autorité nouvelles. Cette Convention, que concerne l'acquisition à titre collectif, par les missions, de terrains et de maisons dans l'intérieur du pays, se recommandait à notre attention, d'abord, parce que la plupart des affaires récentes sont des contestations en matière d'acquisition d'immeubles, ensuite parce que la dite convention semble n'avoir été portée à la connaissance des Vice-Rois qu'avec des additions et commentaires qui en dénaturent le sens.

Un règlement adressé en 1865 aux Vice-Rois par le Surintendant du commerce des ports du Nord a, en effet, ajouté à cette Convention une clause aux termes de laquelle tout Chinois doit, avant de vendre aucune propriété aux missionnaires, demander aux autorités locales une autorisation préalable, qui, en fait, est d'ordinaire refusée. La Légation a souvent protesté contre ce règlement; le Tsong-ly-Yamen a admis le bien-fondé de ses réclamations, notamment dans des lettres du 5 février 1882 et du 31 août 1888, dont j'ai donné lecture aux Ministres. Et cependant la Convention, dans la plupart des cas, n'est pas observée, ou plutôt les autorités locales continuent à y adjoindre l'obligation de l'autorisation préalable, qui en est comme l'abrogation.

J'ai eu la satisfaction d'annoncer il y a quelque temps à Votre Excellence que mes efforts avaient abouti, et qu'après une série de pourparlers et un échange de dépêches

In 1897 Minister Denby, in a communication to the Tsung-li Yamen, demanded that an imperial decree be issued recognizing the right of American missionaries to acquire land and reside in the interior. The Yamen replied that the right to reside in the

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qui s'étendent du 27 juillet au 3 décembre, j'avais réussi à obtenir du Tsong-ly-Yamen le rétablissement intégral et l'envoi aux autorités provinciales de l'Empire du texte authentique réglant le droit d'achat, par les missions catholiques, de terrains et de maisons dans l'intérieur de la Chine.

J'ai l'honneur d'adresser aujourd'hui à Votre Excellence le texte des instructions envoyées, sur ce sujet, par le Gouvernement Imperial aux autorités intéressées, et qui sont de nature à nous donner entière satisfaction.

A. Gérard.

Annexé à la dépêche du Ministre de la République à Pékin, en date du 50 avril 1895: —

LE TSONG-LY-YAMEN AUX VICE-ROIS ET GOUVERNEURS DE TOUTES LES PROVINCES.

*Lettre Officielle.*

Déjà, pendant la 9<sup>e</sup> lune de l'année dernière (octobre 1894), notre Yamen a, relativement à la question des achats de terrains faits par les missions religieuses dans l'intérieur du pays, adressé dans toutes les provinces, ainsi que le constatent les archives, le texte du règlement conclu, pendant la 4<sup>e</sup> année T'ong-tché (1885), par le Ministre de France, s. Exc. M. Berthemy, avec notre Yamen.

S. Exc. M. Gérard, Ministre de France, vient maintenant de nous adresser une communication officielle dans laquelle il nous dit que les autorités locales de certaines provinces telles que le Hou-Kouang, le Tcheli, la Mongolie et la Mandchourie, déclarent n'avoir pas encore reçu d'ordres quant à la façon dont le règlement primitif de M. Berthemy doit être appliqué et qu'il y a aussi d'autres provinces où on continue d'obliger les personnes vendant leurs terrains à en donner préalablement avis aux autorités locales en demandant leurs instructions. Des ordres donnés par apostille du Gouverneur du Kiang-si, une proclamation des autorités provinciales, Sse et Tac, de Sse-tch'ouan, et une proclamation du tao-tai de Leitchéou et Kiong-tchéou, dans le Kouang-tong, ont été envoyés en copie à notre examen (par le Ministre de France), en nous priant d'expédier de nouveau des instructions circulaires dans toutes les provinces, partant que :

"A l'avenir, si des missionnaires français vont acheter des terrains et des maisons dans l'intérieur du pays, le vendeur (tel ou tel, son mon) devra spécifier, dans la rédaction de l'acte de vente, que sa propriété a été vendue pour faire partie des biens collectifs de la mission catholique de la localité. Il sera inutile d'y inscrire les noms du missionnaire ou des chrétiens. La mission catholique, après la conclusion de l'acte, acquittera la taxe d'enregistrement fixée par la loi chinoise pour tous les actes de vente, et au même taux. Le vendeur n'aura ni à aviser les autorités locales de son intention de vendre ni à demander au préalable leur autorisation." De cette façon, le règlement conclu entre les deux nations, est-il ajouté, pourra recevoir son application.

Ayant reçu cette communication, nous croyons devoir adresser la présente lettre officielle à tous les Vice-Rois et Gouverneurs des provinces pour qu'ils en prennent connaissance, agissent en conséquence et prescrivent aux autorités locales de s'y conformer uniformément, sans qu'il y ait lieu de s'en tenir à ce qui a été dit précédemment sur l'avis préalable à donner aux dites autorités locales, ce qui provoquerait des discussions. Ceci est très important. Archives Diplomatiques, vol. lxxi. p. 305.

interior was provided for by treaty, and that imperial decrees had already been issued commanding that the protection should be given to United States citizens residing in China. As to the right to purchase land in the interior the Yamen stated that "while the treaties between the United States and China do not provide for this, still the American missionaries should be treated in this matter the same as the French missionaries."<sup>1</sup>

The amended Berthemy convention is an official recognition of the right to establish permanent missions in the interior; but the rights now recognized are only those which for some time the missionaries have enjoyed in practice. The stipulations in the treaties regarding the objection of the local authorities and the inhabitants must still be observed, and in order to avoid the ever-recurring riots, it is necessary that the local prejudices and superstitions of the inhabitants should not be disregarded. Whether the privileges granted to missionaries will ever be extended to other classes of foreigners is one of the problems to be solved in the future. In 1886 our minister stated in a communication to the Department of State:<sup>2</sup>—

"No manufacturer or merchant would be allowed to settle in Kalgan or other points in the interior where there are flourishing missionary stations. If any distinction, therefore, between missionaries and other classes of citizens were possible under the laws and constitution of the United States the vexed question of residence in the interior might be solved."

While it is true that our consular courts in China administer the laws of the United States, it is not true that our constitution does in any way affect the "vexed question of residence in the interior." It is a well-settled principle of constitutional law that our citizens cannot invoke the protection of the constitution outside the territorial boundaries of the United States.<sup>3</sup> If China sees fit to grant to missionaries rights not accorded to any other class of citizens we have no right to complain. Our constitution does not follow the Chinese flag.

*Louis Napier Richards.*

RICHARDS, ILL., June 20, 1901.

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<sup>1</sup> For. Rel. 1897, p. 62.

<sup>2</sup> For. Rel. 1886, p. 98.

<sup>3</sup> *In re Ross*, 140 U. S. 453.

## JUDICIAL ACTION BY THE PROVINCIAL LEGISLATURE OF MASSACHUSETTS.<sup>1</sup>

ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY.

1708-9.

### CHAPTER 24.

*Order upon the petition of Joses Bucknam relating to Jn<sup>o</sup> Rows Estate.*

UPON READING a Petition of Joses Bucknam of Charles-Town Praying to be Relieved in a Purchase made by his Father Joses Bucknam Dec<sup>d</sup> of John Rowe late Husband of Ruth Rowe, of a certain Parcel of Land in Charlestown, Which the said Ruth Rowe hath obtained Judgement in the Inferiour Court in Middlesex to recover back the Possession, An Appeal being made therefrom to the next Superiour Court to be held in & for the said County ;

*Ordered* That the Action of Appaele be continued unto the next Term further And that Ruth Rowe the Widow & Guardian be Serv'd with a Copy of this Petition ; And that a Hearing be had thereupon, on the Second Friday of the next Session of this Court.

### CHAPTER 25.

*Order upon the petition of Nath<sup>l</sup> Reynes's, complaining of a Judgment by default against him.*

UPON THE PETITION of Nath<sup>l</sup> Reynes, Complaining of a Judgement given against him by Default at the Suit of Cpt: John Frost in the Inferiour Court for the County of York,

*Ordered* That the Pet<sup>r</sup> be referred to the next Superiour Court of Judicature to be holden for the County of Yorke by Writ of Error, for remedy in the course of the Common Law.

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<sup>1</sup> We are permitted by Mr. Bigelow, Editor of the Province Laws of Massachusetts, to print, in advance of the official publication, a few chapters from the ninth volume of ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY. These chapters will be found of special interest in constitutional history and law, throwing light in particular upon the history of equity jurisdiction in Massachusetts. In these records, which are of the first quarter of the 18th century, the provincial legislature will often be found acting in a judicial capacity, sometimes trying causes in equity, sometimes granting equity powers to some court of the common law for a particular temporary purpose, and constantly granting appeals, new trials, and other relief from judgments, on equitable grounds. — ED.



And the Justices of the said Court are hereby Directed, upon Inspecting the Process and Judgment in the Suit aforesaid ; And also the Execution thereon issued to do therein what of right and to Justice appertaineth and ought to be done.

CHAPTER 82.

*Order on Cpt: Ephraim Savage's Petition, Complaining of Ouster of Lands by the Sheriff.*

UPON READING a Petition of Captain Ephraim Savage, Complaining That he is Ousted of a Messuage or Tenement Orchard and Land, Consisting of about thirty acres, Lying situate in Reddin within the County of Midd<sup>x</sup> by Sheriffe of, the s<sup>d</sup> County mislaying an Execution issuing out of Her Ma<sup>ty</sup>s Superiour Court of Judicature at the Suit of Francis Smith, Jeremiah Sweyne and Mary his wife, and Judgment rendred for the said Smith and Sweyne to recover Possession or One Hundred acres of Land according to their Demand by the Writ or Attachment. And in Variance from the Verdict, Judgment and Precept or Writ of *haber facias possessionem* to him Directed.

*Ordered* That Her Ma<sup>ty</sup>s Justices of the said Superiour Court at their next Sitting within the County of Mid<sup>x</sup> Do Inspect and Examin into the Record and process of the said Suit and Execution made thereon and cause what is amiss therein to be rectified, and to see that be done w<sup>ch</sup> is agreeable to Right & Justice. That the Subject be not oppressed grieved & have just cause of Complain<sup>t</sup>.<sup>1</sup>

CHAPTER III.

*Order for a hearing on Nath<sup>n</sup> Hobart's Petition, praying Remedy from forfeiture of a penal bond.*

UPON READING a petition of Nathaniel Hobart of Hingham, Praying that this Court will provide Remedy to Relieve him in Equity from the Forfeiture of a Penal Bond found against him at the Superiour Court, at the Suit of Ebenezer Prout ;

*Ordered* That the Pet<sup>r</sup> cause Ebenezer Prout the Adverse party to be Served with a Copy of this Pet<sup>on</sup> That he may shew cause if any he have, on the Second Wednesday of the next Session of this Court, why this Court should not consider the Complaint thereinmencond and provide releife for the Pet<sup>r</sup> as is prayed for.

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<sup>1</sup> See ACTS AND RESOLVES, 1709-10, chapter 104, *post*, p. 211.

1709-10.

## CHAPTER 6.

*Order, on Nath<sup>l</sup> Hobart's Petition, Suspending Executions of Judgment in Suit Between Him and Ebenezer Prout.*

THE PETITIONER<sup>1</sup> Praying that there may be a Suspension of the Levying of an Execution upon a Judgement given against him at the Suit of Ebenezer Prout under Consideration of this Court to Direct to a Relief in Equity, Also an Execution upon a Judgement for him against the said Ebenezer Prout, Until his Case be heard & determined in Equity by this Court ;

*Ordered* That the Praier of this Petition, be Granted So far as that, the Levying of both the abovementioned Executions, be Suspended, untill the end of the present Session that both Parties may freely attend the Hearing, Granted them by this Court, & their Determination thereon.

## CHAPTER 9.

*Order on the affair of Nath<sup>l</sup> Hobart & Ebenezer Prout.*

UPON A HEARING had this Day between Nathaniel Hobart of Hingham, & Ebenezer Prout, by a Petition prefer'd to this Court by the s<sup>d</sup> Hobart ;

*Ordered* That the Pet<sup>r</sup> be referr'd to the next Superiour Court of Judicature, to be held for the County of Suffolk ; And that the Justices of the s<sup>d</sup> Court Examin into y<sup>e</sup> Judgements given in Law within y<sup>e</sup> said Court against Each party respectively on y<sup>e</sup> Forfeiture of Bonds and Chancer the said Forfeitures to the just Debt and Damages in Equity and good conscience. And yt y<sup>e</sup> Levying of Execution on the Judgem<sup>ts</sup> on either side & all other Proceedings in the law, referring to y<sup>e</sup> s<sup>d</sup> Judgments, be suspended until y<sup>e</sup> End of y<sup>e</sup> said Superiour Court.

## CHAPTER 22.

*Order empowering Joseph Parker to sell Lands of y<sup>e</sup> Estate of Richard Blood Dec<sup>d</sup>.*

[UPON READING] A Petition of Joseph Parker of Groton, Praying to be Impowered to make Sale of the Land of his Father in Law Richard Blood late of the same Place Dec<sup>d</sup> to make him some Re-compence for his great Charge & Trouble to maintain Isabel Relict

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<sup>1</sup> Nathaniel Hobart.

Widow of the said Blood, now of about a Hundred Years old, presented at the Session of this Court in May 1706, & Revived in May Court 1708, And then refer'd to the Justices of the Superiour Court to Cause all Persons concern'd to appear before them, And to Examine into the Matter of the said Petition, & Report thereon ; [and]

The Report of the Justices being now Read ; Viz, That they are of Opinion the Petition is reasonable & ought to be granted ;

*Ordereda* That the Prayer of the Pet<sup>oon</sup> be Granted. Viz<sup>t</sup> That y<sup>e</sup> Pet<sup>r</sup> be and is Impowred to make Sale of y<sup>e</sup> Land therein mentioned and to Execute a good sufficient and Legal Deed of Sale for y<sup>e</sup> same for the End Inserted in the Petition.

#### CHAPTER 73.

##### *Order on Petition of Jer: & Mercy Tay for putting a Bond in Suit.*

UPON READING a Petition of Jeremiah Tay of Boston Mariner & Mercy his Wife only Child of Nathaniel Woodward late of Boston Mariner Dec<sup>d</sup> Setting forth That Robert Woodward Father of the said Nathaniel dying Intestate, The County Court for Suffolk (having then Power by Law for Distribution & Settlement of the Estates of Intestates), disposed of the whole Estate of the said Robert Woodward unto Rachel his Wife & Administratrix (Who had intermarried with one Thomas Harwood) for Payment of the Dec<sup>as</sup> Debts & Education of his Children, And Assign'd Forty Pounds to the said Rachel for Dower, The Remainder in Portions to his Children, The said Admin<sup>r</sup> or her Husband Thomas Harwood to give Security for Payment thereof, And the said Thomas Harwood having accordingly given Bond to M<sup>r</sup> Edward Rawson then Recorder of the said County (who is since Dec<sup>d</sup>) & his Successors for Performance thereof, Praying that some Person may be assign'd & appointed capable in Law to put the said Bond in Suit, Her Father Nathaniel Woodward not having received his Portion ;

*Ordered* That Addington Davenport Esq<sup>r</sup> present Register of the County of Suffolk, Be and hereby is Directed and Impowred to put the withinmentioned Bond in Suit, to the use of the persons for whome it was given.

#### CHAPTER 104.

##### *Order on Cpt: Ephraim Savages Petition, Complaining of a Levy upon a Judgment against him.*

UPON READING the Petition of Cpt: Ephraim Savage, Complaining of the Misfeasance of Cpt: Samuel Gookin Sheriff of the

County of Middlesex, in the Levying of an Execution or Writt of Haberi facias Possessionem, granted upon a Judgement given against him at a Superiour Court of Judicature holden at Charles-town within the County afore said, on the twenty seventh of January 1707, at the Suit of Francis Smith Yeoman, & Jeremiah Swayne Chirurgeon & Mary his Wife, all of Reading, for their Title and Possession of & in One Hundred Acres of Land scituate in Reading afore said in the County afore said, within the Bounds of a Farm formerly the Estate of Francis Smith Dec<sup>d</sup> Ajoining to the Homestead of the Said Cpt: Savage :

It evidently appearing on the Face of the Record of the said Judgement & Precept, & the Sheriffs Return'd thereon, that the Sheriff hath acted contrary to his Precept in Levying the Homestead of the said Savage or the greater Part thereof to his grievous Hurt & Damage, as of his Complaint in this Petition ;

*Ordered* That her Majesty's Justices of the Superio<sup>r</sup> Court of Judicature at their next Sitting in Court within the County of Midd<sup>x</sup> afores<sup>d</sup> Do Inspect the afores<sup>d</sup> Record and the Return made by the Sheriffe on the Precept to him Granted, And on Consideration of the Variance therein, and the mislaying thereof on the homestead of the s<sup>d</sup> Savage, to make void that Precept and the Service thereof ; And Award an alias Execution w<sup>th</sup> just cost and Damages to the party grived.

#### CHAPTER 165.

##### *Vote granting to Clem. Cock a Review of a Cause at Law.*

UPON READING a Petition of Clement Cock, Praying he may be Enabled to review a Cause heretofore tried between him & Joseph Hill Attorney to Anthony Penn, being without Remedy in the Course of the Common Law :

*Voted* that the Adverse Party be served with a Copy of this Petition & to shew Cause if any he have, why the Prayer thereof should not be granted, on the first Tuesday of the Session of this Court in May next. And that the Adverse Party be strictly forbidden to make any Strip or Wast of the Timber or Trees on the said Land in the Mean Time.

#### 1710-11.

#### CHAPTER 41.

##### *Order on Benj<sup>n</sup> Halewell & Frances Morse Petition to be Relieved from a Bond.*

UPON READING the Petition of Benjamin Halewell & Frances Morse Administratrix of the Estate of Benjamin Morse Dec<sup>d</sup> Pray-

ing to be relieved from a Bond wherein they became Surety for John Thwing Dec<sup>d</sup> for Paying his Brother & Sister their Portions of the Estate of their Father John Thwing Dec<sup>d</sup> his House & Land being forfeited & recovered upon Mortgage at the Suit of John Green of Boston Cooper;

*Ordered* that the Fifty Pounds<sup>1</sup> or so much as is justly due from the said Green upon his Accompt to be made up with the Judge of Probate after the said Judgement & Charges are satisfied be delivered unto the Judge of Probate within the County of Suffolk, And after the just Debts of John Thwing Mariner Dec<sup>d</sup> be discharged, The Surplusage or remaining Part of the said Money shall be distributed in rateable Parts to & among the Children of the said John Thwing the Elder; Having Consideration of what each of them received of their Brother John Thwing in his Life Time towards their Parts; And that the said John Green & the Petitioners shall be discharged of all & all Manner of Demands from any Person or Persons upon the Estate of either of the aforesaid Thwings.

## CHAPTER 116.

*Order Granting the Petition of Cpt. Jos: Eaton.*

UPON READING a Petition of Joseph Eaton Agent for the Freeholders. Proprietors & Inhabitants of the Town of Salisbury within the County of Essex, Praying on the Behalf of the Said Proprietors that they may be Enabled by an Act or Order of this Court to have the Hearing of a Cause before the Superiour Court of Judicature tried at the Inferiour Court of Common Pleas held at Newbury in the County of Essex on the last Tuesday in September 1706: between John Coy of Wenham &c Plaintiff V<sup>a</sup> the said Proprietors Defend<sup>ts</sup> Who by their Agent appealed to the next Superiour Court of Judicature, Where the said Appeal was dismiss'd, for an Omission or Lapse in the Direction of the Reasons of Appeal, & have no Way open in the Course of the Common Law to bring on y<sup>e</sup> same again.

*Ordered.* That the Prayer of the Petition be Granted, and that the S<sup>d</sup> Proprietors be and hereby are allowed and Enabled to have a Hearing of the cause commenced ag<sup>t</sup> them by John Coy of Wenham Carpenter only surviving Son and heir of Richard Coy (said to be) formerly of Salisbury dece<sup>d</sup> In the Inferio<sup>r</sup> Court for the County of Essex held at Newbury on the 24<sup>th</sup> of Sept<sup>r</sup> 1706. and

<sup>1</sup> Green had admitted that he had "in his hands about Fifty Pounds after satisfying the judgment" in his favor. Mass. Archives, xvii. 246.

the Judgement given thereupon mentioned in the Petition, before the Superiour Court of Judicature to be hol[de]n<sup>1</sup> at Ipswich the third Tuesday of May next, in nature of an Appeal; and the Judges of the s<sup>d</sup> Superio<sup>r</sup> Court are hereby Impowred and Directed to receive, Hear and Try the said cause accordingly; And to allow an amendement of the Lapse or mistake in the Title or Directions of their Reasons of Appeale from the Judgem<sup>t</sup> of the afores<sup>d</sup> Inferiour Court formerly given in: So that the Appell<sup>ts</sup> cause the adverse party to be notifyed of this Tryal, by a Summons issuing out of the Clerks Office of the Superiour Court, and Served upon him fourteen day's at least before the Courts sitting; and in case they obtain Judgement upon this Tryal, no former Costs be Allowed them.

## CHAPTER 131.

*Order reviving a hearing on petition of Eleazar Walker.*

UPON READING a Petition of Eleazar Walker of Taunton annexed to his Petition presented to this Court in June last past, Praying for Relief in Equity against Joseph Tisdale of the same Place for not Rendring unto him the said Walker two Lotts or Shares of Land in the South Purchase in Taunton afore said, Which he conveyed to the said Tisdale for a Security (as he saith) for about Thirteen Pounds in Money borrowed of him, upon his Promise to restore the same upon Payment of the said Money, with Interest, W<sup>ch</sup> he now refuseth to do, And a Hearing of the said Matter being appointed on the first Tuesday of the last Session, Before which Time the said Parties entered into a Bond of Submission to leave their Differences to the Determination of certain Arbitrators therein named, But the said Tisdale neglected to attend the said Arbitrators, so that they declined to Make any Award upon the said Matter, PRAYING that his Petition may proceed & a Hearing be had thereon.

*Ordered* That the Hearing before appointed be Revived and continued to the Second Wednesday of y<sup>e</sup> next Session of the General Assembly.

And that the Pet<sup>r</sup> cause Joseph Tisdale the person complain<sup>d</sup> of to be Notifyed then to attend, by Serving him with a Copy of these Petitions and the Order of this Court thereupon.

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<sup>1</sup> Manuscript mutilated.

1712-1713.

## CHAPTER 36.

*Resolve Granting Jn<sup>r</sup> Clark Esq<sup>r</sup> Petition in Regard to Entail.*

UPON READING a Petition of John Clarke Esq<sup>r</sup> Setting forth that his Grand-father John Clark Gentleman of Boston within the County of Suffolk Physician diverse Years since Deceased being seized in his own Demesne as of Fee of a certain Messuage Tenement or Dwelling House with a large Yard & Garden adjoining & belonging, scituate at the Northerly End of the Town of Boston on the Westerly Side of Fish Street, & a Wharf & some Buildings lying on the Easterly Side of the Street & Right in the Flatts to the Sea-board thereof, All which he devised in & by his last Will & Testament to his only Son John Clark, Father of the Petitioner (since deceased) & the Heirs Male in Tail, now descended to the Petitioner, the Buildings being old & fallen to Despair, notwithstanding the Petitioners Disbursements of considerable Sums of Money from Time to Time to uphold the same, & will soon become ruinous without a far greater Expence made thereon, which the Petitioner is unable to advance without apparent wrong to his Family, having several Children; Proposing & Praying that the Tail may be cutt off from Part of the said Land on the Westerly Side of of<sup>1</sup> the afore said Street, Viz, on the Northerly Side thereof abutting on Gallops Alley so called, for Thirty Feet in Breadth Easterly next the Street, & the like Breadth on the Westerly End, abutting on Samuel Flacks Land, which will not be one Third Part of the Breadth of the whole Land on that upper Side of the Street & contains one Hundred Feet in Depth, & that the same may be assigned to him his Heirs & Assigns for Ever in Fee with out Limitation, that he will in Lieu thereof at his own Cost & Charge build out the Wharf on the Easterly Side of the Street One Hundred Feet in Length to the Sea-board of Thirty two Feet in Breadth, And erect a Building or Ware-house thereon of sixty Feet in Length & eighteen Feet wide to remain under the same Tail with the other Part of the Lands and Buildings:

William Clark only Brother of the Petitioner & next Heir in Tail to the Premises in Failure of the Petitioners Male Heirs, agreeing to the said Proposal & having subscribed the Petition;

*Ordered* that the Prayer of the Petition be Granted.

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<sup>1</sup> Sic.

## CHAPTER 113.

*Order on John Websters Petition in Regard to an action of Trespass.*

UPON READING a Petition of John Webster of Hampton, Setting forth That in an Action of Trespass brought against him by Cpt. John Wadleigh of Salisbury for Cutting Thatch or Sedge in a certain Piece of Marish Ground belonging to the Petitioner, lying in the Township of Hampton within the Province of New-Hampshire, three Miles & a Quarter distant from Merimack River in any Part thereof, depending in the Inf<sup>r</sup> Court within the County of Essex, under Advisem<sup>t</sup> upon the Petitioners Plea to the Jurisdiction; Praying the Cause may be superseded, The Line betwixt the two Provinces not being adjusted & settled;

*Ordered* that the said Cause be superseded for six Months next Coming, And that the Justices of the Court govern them selves accordingly.

## CHAPTER 120.

*Ord<sup>r</sup> on Joshua Seeknouts Petition in Regard to a Judgment by Default against him.*

UPON READING a Petition of Joshua Suckenot Indian Sachem of the Island of Chepaquidock in Dukes County, Praying that a Cause lately given against him by Default in the Inferiour Court of Common Pleas holden at Edgar Town in the said County in an Action of Trespass brought against Nicholas & Phinehas Norton by John Norton before Benjamin Skiffe Esq<sup>r</sup> one of her Majesties Justices on the eighteenth of August 1712, Where the Petitioner at his Request was admitted Defend<sup>t</sup> & obtained Judgem<sup>t</sup> for Costs From w<sup>ch</sup> the said John Norton appealed to the Inf<sup>r</sup> Court afore said & there obtained the Judgem<sup>t</sup> by Default; Praying that the said Cause may be brought to the next Sup<sup>r</sup> Court of Judicature to be holden at Plimouth & that the said John Norton be obliged there to appear, that the Issue between him & the Petitioner may be there tryed;

*Ordered* that the Prayer of the Petition be granted, That the Cause be brought to the next Superiour Court of Judicature to be holden at Plimouth & that an Ord<sup>r</sup> be drawn accordingly.<sup>1</sup>

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<sup>1</sup> In the following January Seeknout petitioned the legislature for the order which was to be drawn in his favor, and received it in these terms:—

"*Ordered* that the Prayer of the Petition be granted, & That the Court receive & hear the Cause accordingly the Petitioner Causing the adverse Party to be served with a copy of this Order by the Sheriff or his Deputy fifteen Days at the least before the Sitting of the said Court." Legislative Records of the Council, ix. 255.



## CHAPTER 150.

*Resolve allowing Banisters Petition for an appeal from a Judgment.*

UPON READING a Petition of Thomas Banister of Boston Merch<sup>t</sup> Praying Relief for that at a late Inferiour Court of Common Pleas held at Boston for & within the County of Suffolk a Judgement was entered up by Default against the Goods & Effects of Jeremiah Garvan Merchant in Fayal in the Hands of the Petitioner as Factor for the said Garvan at the Suit of Moses Bow, the Petitioner being summoned to appear & answer to the said Suit, agreeable to the Act entituled An Act to enable Creditors to receive their just Debts out of the Effects of their absent or absconding Debtors, From which Judgement the Petitioner asked an Appeal, but was denied the same, And at an After-Inferiour Court upon a Writt of Scire facias, Judgement was entered up against the Petitioner to satisfy the Sum recovered by the Principal Judgement as of his own proper Debt, W<sup>ch</sup> will be to his Loss as he alledgeth several Hundred Pounds :

The Law allowing an Appeal generally in all Cases upon Judgements given in the Inferiour Court, And it appearing that the Petitioner demanded an Appeal sitting the Court within the Time limited by Law ;

*Resolved* that the Challenge of the Appeal ought to have been received, And that he be now admitted thereto & have the Benefit of the Law in that Respect to be heard before the next Superiour Court of Judicature to sit in Boston : And that the Judgement of the Inferiour Court upon the Scire facias and the Appeal depending thereon are hereby suspended.

1719-20.

## CHAPTER 130.

*Order on Gyles Dyers Petition.*

A PETITION of Gyles Dyer Merch<sup>t</sup> Shewing that at an Inferiour Court held at Boston for the County of Suffolk on the first Tuesday of October last past, he recovered Judgment against John Barnard late of Boston Merch<sup>t</sup> for the sum of two hundred eighty four Pounds twelve shillings & nine pence ; That at the same Court

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The Secretary's record of this second petition sets out more fully the nature of the suit in question. It is here stated that Seeknout complained "of undue Proceedings in a Suit brought by John Norton against Nicholas & Phineas Norton for Trespass for Driving a Mare of the said John Nortons off the said Island by Direction of the Petitioner, And in which Suit he was admitted Defendant." Ibid.

the said John Barnard recovered Judgment against the Petitioner in three Actions for the sum of two hundred and ninety pounds; but so it is, that the said Barnard is absconded, so that the Petitioner can receive no Benefit from his Judgment against Barnard, altho he has taken out Execution thereupon; but the Petitioner will be liable to the Execution of the said Barnard upon his three Actions, when Judgment should be made thereon, the same being respited by the Judges of the Superiour Court till the Court shall meet upon their adjournm<sup>t</sup> upon the Petitioners humble Petition to the Judges; that the said Barnard will have an Attorney to receive the Money recovered against the Petitioner, on purpose to defraud him; who will be left without Remedy unless relieved by this Hon<sup>ble</sup> Court, and therefore humbly praying that An Act may be made for his Relief; which may order the said Money levied by the said Barnard's Execution, to be lodged in the Superiour Court, that so it may be subjected to the Petitioners Execution, or otherwise, as to the Justice & Wisdom of this Hon<sup>ble</sup> Court may seem most proper & fitting.

*Ordered*<sup>1</sup> that the further Consideration of this Petition be refer'd to the next Session of this Court, & that in the mean time Executions be stayed on both Sides.

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<sup>1</sup> An order of hearing and notice to Barnard, passed November 26, having failed for want of Barnard's appearance.

# HARVARD LAW REVIEW.

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THE uniform purpose of the REVIEW has been to present a periodical useful to lawyers in active practice as well as to those interested in law as a scientific study. Much remains to be accomplished; yet it is believed that the results justify the continued effort to meet the need for such a legal magazine.

Beginning with the next number, it is proposed to increase the scope of the editorial work. A new department will be established, containing, in addition to the present book reviews, an index of articles in other legal periodicals, with a criticism of those particularly important. The purpose of this undertaking is not only to afford a complete and easily accessible reference to current legal articles, but also to present a critical discussion of important problems which may not happen to arise in current cases.

The demand for volumes already issued is such that it has become necessary to begin to reprint extensively. Although the work of reprinting is proceeding as rapidly as possible, at present only a limited number of orders for early volumes can receive attention; ultimately, however, it is expected that all orders will be filled. An exhaustive analytical index of the articles and editorials is also being prepared, and will be issued at a small charge with the last number of the current volume. By thus making readily accessible the valuable material in the fifteen volumes, it is hoped that the REVIEW will become still more useful as a reference book for student and practitioner.

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THE LAW SCHOOL. — The school opens with several changes in the curriculum made necessary chiefly on account of the assumption of Pro-

fessor Langdell's work by Professor Ames. Two courses in Equity Jurisdiction will hereafter be given by Professor Ames, one open to second and the other to third year students; but for this year these courses will be identical. Professor Strobel takes the place of Professor Ames in the half course on Admiralty, while Mr. Wyman, LL. B. 1900, will conduct the course on Suretyship and Mortgages. Roman Law, the Interpretation of Statutes, and Administrative Law are omitted; as usual in alternate years, the course on the New York Code is replaced by lectures on Massachusetts Practice, given by Mr. E. R. Thayer. Professor Gray and Assistant Professor Westengard again divide the work of Property I. and Property II. Mr. Peabody will continue to assist Professor Beale in Criminal Law, while Professor Williston will be without an assistant in first year Contracts. Professor Strobel will repeat the course, introduced last year, on the Civil Law of Spain and the Spanish Colonies. The lectures on Patent Law, omitted for several years, will be resumed this year by Mr. J. L. Stackpole, LL. B. 1898. The size of the entering class and the total number of students thus far enrolled are both practically the same as last year; the exact figures will be given in the December number.

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THE ABSENCE OF JUDICIAL PRECISION. — Whether the decisions in the *Insular Cases* are considered correct or incorrect, it seems generally admitted that the opinions rendered are deficient in clearness and in precision, elements most essential in cases of such importance. Elaborate discussions and irreconcilable differences upon general principles, and upon fascinating and fundamental problems suggested by equally indiscriminating *dicta* in other cases, complicate, where they do not hide, the points at issue. It is extremely difficult to determine exactly what has been decided; the position of the court in similar cases arising in the future, or still pending, is entirely a matter of conjecture. Perhaps the most striking instance of a decision which, apparently, entirely overlooks a question necessarily involved, is to be found in the case of *Dooley v. United States*, 21 Sup. Ct. Rep. 762.

Duties had been collected from the plaintiff on goods imported into Porto Rico from the United States, first, by order of the military authorities before the cession of the island to this country; second, under orders issued by the President after the cession; and third, under an act of Congress passed still later. In deciding the first point the court properly held that the plaintiff could not recover for duties collected by the military authorities; the question of the validity of the duties imposed by act of Congress, raised under the third head, remains to be decided in the suit still pending. As regards the duties collected under the second head, the court, intimating that the orders of the President might be valid in so far as they imposed duties on imports from foreign countries, nevertheless decided that the President had no power to impose duties on goods imported from the United States. It may be difficult to support the distinction drawn; but conceding the correctness of this decision, does it follow that such imports were entitled to entry free of all duty? It must be remembered that the court had just decided, under the first head stated above, that up to the time of the cession imports from the United States were subject to duties under the existing laws as established by the military authorities. Heretofore the rule has been uni-

versally accepted that the laws of a ceded country remain in force until changed by the new sovereign. The orders of the President, being void, could not have repealed the existing laws, and Congress did not attempt to change those laws until later. Under the rule stated, therefore, it would seem that the tariff law existing at the time of cession continued in full force, making imports from the United States subject to duties as before. Without intimating that the rule stated is incorrect, and without indicating any fact showing a change of the law by the United States, it was, nevertheless, assumed that imports into Porto Rico from this country were entitled to entry free of all duties. Obviously the court could have declined to follow the rule stated; it is even possible that some clause in the Constitution might have been interpreted as changing the laws in question. But in passing by both points without consideration, the opinion rendered not only fails to consider the question decisive of the issue, but also leaves it in a state of the utmost confusion. Either the effect of cession on existing laws was entirely overlooked, or the above rule, that existing laws continue until changed by the new sovereign, — a proposition accepted as a necessary principle in every system of law, — has been overruled without the statement of any reason. In either event the absence of judicial precision has resulted in a decision the effects of which cannot be foretold. The minority, to whom one might naturally look for the correction of such errors, does not assist the settlement of these difficulties by the attempt to prove that Porto Rico is a foreign country.

It is still more to be regretted that the defects in the decision under discussion are by no means exceptional. From our system of allowing judges to express opinions upon general principles and of following judicial precedent, two evils almost inevitably result: our books are overcrowded with *dicta*, while *dictum* is frequently taken for decision. Since the questions involved are both fundamental and political, in constitutional cases more than in any others the temptation to digress, necessarily strong, is seldom resisted; at the same time it is strikingly difficult, in these cases, to distinguish between decision, *ratio decidendi*, and *dictum*. Yet because the questions involved are both extensive and political, and because the evils of a *dictum* or of an ill-considered decision are of corresponding importance, a precise analysis, with a thorough consideration of the questions raised, and of those questions only, is imperative. The continued absence of judicial precision may possibly become a matter of political importance; for opinions such as those rendered cannot be allowed a permanent place in our system of government.

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A PROBLEM IN RATIFICATION. — In a recent decision of the House of Lords, overruling a judgment of the Court of Appeal, a neat problem is presented, as to the possibility of a ratification, where the quasi-agent does not profess to act as agent. One Roberts entered into a contract with the plaintiffs, intending to act for the defendants, but without being authorized, and without professing so to act. The Court of Appeal held that under such circumstances a ratification was possible, as a logical result of the established doctrines of undisclosed principal and ordinary ratification. *Durant v. Roberts*, [1900] 1 Q. B. 629 (C. A.). See 14 HARVARD LAW REVIEW, 153. It was said that as ratification was equiv-

alent to a prior command, the position of the defendants, on adopting Roberts's act, was that of an undisclosed principal, who could sue or be sued on the contract. The fact that the plaintiffs did not know that the quasi-agent was acting for a third person made no difference, as that was always the case with an undisclosed principal, and that consequently, as far as the plaintiffs were concerned, their position was the same, whether Roberts had received his prior command actually, or fictitiously by ratification. It was further urged that professing to act as agent was only evidence of the vital requisite, namely, an intention to act as agent, and that all that was necessary was that Roberts did in fact act in behalf of the defendants. The difficulty with the first part of the argument rests in an assumption of the point at issue. If the defendants could have ratified Roberts's act, they would have become undisclosed principals, as suggested, but is it possible to ratify an act done in one's behalf, unless it is professed to be done in one's behalf? This question is purely one of ratification, and not of undisclosed principal, and on appeal to the House of Lords the judges were unanimous in answering it in the negative. *Kighley, Maxsted & Co. v. Durant*, [1901] A. C. 240. The problem is interesting, as there are no direct decisions on the point, and as the few casual *dicta* suggest opposite views. *Bird v. Brown*, 4 Ex. 798; *Watson v. Swann*, 11 C. B. n. s. 755. Unfortunately, also, the history of ratification, old as it is, does not throw a clear light on the subject.

In the House of Lords the problem is discussed as a matter of interpreting established definitions of ratification, and is argued on practical grounds. The words "acting in behalf of," for example, are construed as meaning necessarily "professing to act in behalf of." It is said that ratification is itself a fiction, that the doctrine of undisclosed principal is anomalous, and that to combine the two, and allow a stranger to become a party to a contract, merely because of an undisclosed intention existing in the mind of one of those contracting, would be adding anomaly to anomaly, rather than correcting an anomaly. According to one judge, "it would enable one person to make a contract between two others by creating a principal, and saying what his own undisclosed intentions were, and these could not be tested." The court's line of argument, it is to be regretted, is not very clearly stated, the theory of ratification and of undisclosed principal, being constantly confused. It would seem that once given the problem, as one of ratification, no discussion of undisclosed principal is in point. If we have any chance for ratification, there can be no principal disclosed or undisclosed. The difficulty with the problem is that there is nothing in the law to show clearly whether a vital requisite is the intention to act as agent, or the profession of that intention to the third party. As a matter of definition it is purely a question of the interpretation of a few familiar phrases. The problem involves the still more perplexing problem as to the relation of all concerned just before ratification. *Vide* 9 HARVARD LAW REVIEW, 60. Perhaps the best view is that the contract between the third party and the agent is in the nature of an offer to the principal, which the latter may accept or reject by an election operating upon the previous unauthorized acceptance of the agent. According to this view, it would seem that in the principal case there could be no ratification, for surely the plaintiffs could not be said to be making an offer to the defendants, when they believed they were making a simple contract with Roberts. In the theories advanced there is a common attribute, namely, an attitude of

mind on the part of the third party toward some definite or indefinite quasi-principal. Accordingly it would seem that the quasi-agent must disclose the fact that he is acting in behalf of some one else, or, in other words, as the House of Lords decides, that for a valid ratification it is essential that the quasi-agent profess to act as agent.

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“BOYCOTTS.”—The case of *Allen v. Flood*, (1898) A. C. 1, has generally been regarded not only as representing the law in England on the subject of malicious interference with business, but also as laying down principles applicable to the whole law of torts. The correctness of the decision on its own facts can never be denied in England; but the recent case of *Quinn v. Leathem* (70 L. J. Rep. 76), also before the House of Lords, seems to diminish greatly its authority.

Leathem, a butcher, employed workmen who did not belong to the local trades union. Representatives of the union demanded that Leathem cease to employ these men. On his refusal, they by various means induced several of his customers, and also several of his workmen, to leave him; and thereby ruined his business. The most damaging measure taken by the union was to induce one of his principal customers, a butcher, named Munce, to cease taking meat from him, by threats that they would call out Munce's union employees. Leathem brought suit against several of the union leaders for wrongful interference with his business, and recovered damages. The verdict was sustained by the courts in Ireland, and finally by the House of Lords.

In *Allen v. Flood*, the plaintiffs were workmen who were objectionable to other men employed by the same firm. The defendant, a delegate of the union to which the latter workmen belonged, represented to the employers that unless the obnoxious men were dismissed all the men in his union would stop work. It was not clear whether the defendant merely communicated to the employers a resolution already formed by the members of the union to stop work unless the objectionable men were discharged, or whether he threatened that if the employers did not accede to his demands he would call the workmen out. In deciding *Quinn v. Leathem*, the lords take the former view, and treat the case as authority only for the proposition that a person who merely communicates facts, without using any threats, is acting lawfully, whatever his motives. It would seem, nevertheless, that the opinions of the majority in *Allen v. Flood* might well have been taken to lay down a doctrine broad enough to prevent recovery in a case like *Quinn v. Leathem*, except that they left open the question of the effect of a conspiracy. The Irish courts, in fact, thought it necessary to take advantage of the element of conspiracy to distinguish *Allen v. Flood*. The House of Lords, however, treating that case with less respect, decline to rest their decision on the sole ground of conspiracy, and avoid giving any precise definition of its effect. They treat the defendants' acts as illegal because they were intended to injure the plaintiff by ruining his business, and were of such a nature as the law would not under all the circumstances regard as justifiable, when so intended.

The case of *Allen v. Flood* may be treated in two ways. It may be regarded as an authority for a general view of the law of torts, that an act not otherwise unlawful cannot be rendered so far wrongful, by the

presence of an express intention to damage some person, as to make it necessary for a defendant to show a good motive by way of justification. It can hardly be doubted that Lord Herschell took some such view. See 11 HARVARD LAW REVIEW, 405. The result of the case, however, may be reached under the contrary theory of the law of torts, that every intentional infliction is actionable unless shown to be done with motives, or under particular circumstances, which the law treats as a justification. The aim of the defendant to strengthen his trades union may then be treated as a justification of his acts. It is presumably on this ground that Mr. Chief Justice Holmes, who has ably set forth the latter theory of torts in 8 HARVARD LAW REVIEW, 1, approved the decision of *Allen v. Flood* in his dissenting opinion in *Plant v. Woods*, 176 Mass. 492, 504.

The case of *Quinn v. Leathem* has a double effect. It effectually discredits the conservative view of the law of torts advocated by Lord Herschell. At the same time, it furnishes a weighty authority against the legality of the form of action by labor organizations commonly called a "boycott." It is to be regretted, however, that the opinions of the lords do not go farther towards giving some satisfactory criteria for the guidance of the courts, and of the public, in dealing with matters of such serious importance.

R. G.

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INTERSTATE COMMERCE AND THE COMMON LAW.—The question whether, in the absence of congressional legislation, a court has jurisdiction over interstate commerce has aroused much discussion. Some courts have held that there are no laws, except congressional enactments, which can affect such matters, and so long as Congress fails to act, interstate carriers are free to carry on their business as they please. *Swift v. Phila. & Reading R. R.*, 64 Fed. Rep. 59; 9 HARVARD LAW REVIEW, 217. On the other hand, it is said that there is in force throughout the country a national common law, which regulates the matter. *Murray v. C. & N. W. R. R.*, 62 Fed. Rep. 24; 8 HARVARD LAW REVIEW, 168. As it has been thought necessary to go to either one of these extremes, it will doubtless be generally assumed that a recent decision of the United States Supreme Court has settled the controversy in favor of a national common law. Although there is no congressional statute which applies, the plaintiff, in the case in point, obtained a judgment in a state court for unreasonable discrimination in rates for interstate business. This judgment was affirmed in the Federal Supreme Court, which held that the state court had sufficient jurisdiction and authority. *Western Union Teleg. Co. v. Call Publishing Co.*, 21 Sup. Ct. Rep. 561. A careful analysis of the opinion, however, shows that the decision is limited to the question of the liability of interstate merchants, and although the language of the court is very broad and general, it does not commit itself definitely concerning the existence of a general common law.

It is well that the question has been left open for further discussion, as neither of the prevailing theories seems satisfactory. It would be an unfortunate result to hold that interstate carriers have the commerce of the country at their mercy, and that these carriers may refuse to serve when they wish and may charge whatever they see fit. 7 HARVARD LAW REVIEW, 488. On the other hand, the objection may be raised that the common law in force in each state is adopted by the state itself. If there is a general common law, it must issue from some sovereign power,



which, in this case, can only be the Constitution. As the existence of two systems of law, operating upon the same subject-matter within one state, seems fundamentally impossible, the logical result is that the Constitution has forced a system of common law upon all the states; a doctrine which receives but little support from that instrument. *Forcpaugh v. Del., Lack. & West. R. R.*, 128 Pa. St. 217. It does not seem necessary to go to either of these limits to support the principal case. The common law of the states, generally very similar, is sufficient to control interstate carriers. It is no more impossible for a state to forbid discrimination within its limits, although the contract contemplates an interstate carriage, than it is to control a contract made within its jurisdiction concerning the sale of land in other states. In the light of these facts, failure by Congress to legislate can only be construed as an intention to adopt existing conditions, and hence to leave interstate commerce to the care of state law. *Smith v. Alabama*, 124 U. S. 465. This view is possible under this last decision, and seems to avoid the dilemma which is supposed to have confronted the court.

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**LIABILITY FOR DAMAGES CAUSED BY UNLAWFUL ACTS.**—The principle on which liability is imposed for damages resulting, as the unforeseen consequences of unlawful acts, has never been exactly defined. A recent decision suggests an important distinction between those cases where the unlawful act is morally wrong and those where it is merely in the nature of a public tort. *Osborne v. Van Dyke*, 85 N. W. Rep. 784 (Ia.). The defendant, while beating his horse with a pointed stick, slipped, and thereby accidentally struck the plaintiff. The court held that if the defendant was breaking a statute forbidding cruelty to animals, and the plaintiff's damage was a direct consequence of his act, he was liable even though the damage could not reasonably have been foreseen.

It is commonly admitted at the present day that the general ground for liability in tort is damage directly caused to person or property by blameworthy conduct on the part of another as regards that person or property. This principle seems to have been reached, both consciously and unconsciously, on the theory that human activity is to be encouraged, and, consequently, that loss should be allowed to rest where it falls, if the party causing it has been blameworthy towards the party damaged, only in having been active. Two exceptions to this rule, in cases of unlawful acts, apparently exist. In the first place, where a defendant is engaged in some act unlawful because of its morally wrong nature, he is made liable for any damage directly resulting from the act. Although considerable doubt has been thrown on this proposition, Terry's Leading Principles of Law, 555, yet it appears to have been followed by the few decisions in point, and to have a rational foundation. *James v. Campbell*, 5 C. & P. 372. The reason for not holding liable a defendant who has merely been active in causing damage, namely, that human activity is to be encouraged, entirely fails where we find that the activity was of a criminal nature. In the second place, where there is a breach of a statute forbidding or ordering an act which is not immoral, but which constitutes merely a public tort, there is liability for damages resulting, provided the injured party is of that class which the statute was designed to protect. *Gorris v. Scott*, L. R. 9 Ex. Div. 125; *Atkinson v. Newcastle Waterworks*

*Co.*, L. R. 2 Exch. 441. This limitation seems extremely wise, whether liability in such cases is founded on the statute of Westminster, ii. c. 50, in which case it would logically follow, or, as seems more probable, is purely judge-made. It would be impolitic, and contrary to the guiding principle of torts to hold one who, without moral wrong, broke a statute, of the existence of which he may have been ignorant, liable for damages not intended to be guarded against by the statute, and perhaps not to have been foreseen as possible.

While most of the decisions accord with the principles here laid down, yet as the courts state no clear destruction between the two classes of cases, errors are likely to result. In the principal case, for example, the court supports its decision by citing cases where damage resulted from statutory torts. It is clear, however, that the statute here involved was not intended for the plaintiff's protection, and, therefore, that the plaintiff's recovery, which seems proper, must depend on the fact that the defendant was committing a morally criminal act, and could properly be held to act at his peril.

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PURCHASER FOR VALUE, WITHOUT NOTICE, OF A POWER OF ATTORNEY. — The English court has recently decided that a *bona fide* purchaser for value of a power of attorney to convey property must hold such property, when conveyed, subject to equities of which he obtained notice subsequent to the purchase of the power, but prior to the actual conveyance. *London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231. A trustee gave the plaintiff bank as security equitable mortgages on certain leaseholds, which, unknown to the bank he held in trust, and in addition a power of attorney to three of the bank's clerks to convey the titles to the leaseholds as the bank should direct. On hearing of the trust, the bank had the titles conveyed to itself. The court held that although the trustee's legal titles were thereby transferred to the bank, the latter must hold them subject to the equity. While these circumstances have not before come up for decision, the principle applicable to them seems similar to that involved where shares of stock held in trust are sold to a *bona fide* purchaser, together with a power of attorney to transfer the legal title on the company's books, or where similarly a simple chose in action is assigned by granting a power of attorney to sue. In all three cases the question is whether or not the power of attorney has conferred such legal rights that equity will not interfere. As regards the first of these cases the English court in 1865 held that, as the grantee of the power could obtain title by his own act, he took free of equities, a decision which has since been neither expressly affirmed nor overruled. *Dodds v. Hills*, 2 H. & M. 424. As regards the second class of cases, where choses in action have been assigned, in England the assignee has been held to take subject to equities. *Brandon v. Brandon*, 7 D. M. & G. 365. In America the conflict of authority is irreconcilable. *Downer v. South Royalton Bank*, 39 Vt. 25; *Himrod v. Gilman*, 147 Ill. 293. No conclusive reasons, however, have been advanced for either view.

It has been generally admitted that, while, on the one hand, equity will not enforce, as against prior equities, any equitable rights which a *bona fide* purchaser for value may acquire, yet, on the other hand, it will not deprive such a purchaser of any legal rights he may obtain. The question at issue in these cases, then, seems to depend on the exact

nature of the right conferred by a power of attorney. It has been argued that the power to sue or to transfer title is a legal right, distinct from the ownership of the chose in action or the title, and that, as this right may be transferred at pleasure, its purchaser should be allowed to use it, and acquire rights under it, just as a *bona fide* purchaser of a legal title is absolutely entitled to the free use of his property. 1 HARVARD LAW REVIEW, 6, 7.

This view is clearly correct in regarding the power of attorney as conferring a legal right, for it is a right recognized at law, and protected in equity only to the same extent as other legal rights. However, the extent of the right seems to be misconceived. The legal rights to bring suit or to transfer title are not severable from the ownership of the chose in action, or the title, nor can they be created in others by the owners of such property. They appear to be merely necessary legal incidents dependent on such ownership, and the grant of a power of an attorney effects, not a grant of them, but merely the grant of a legal right to represent the owner in using them. This right originated in the old law courts, where it was found that a suitor, through absence or ignorance, often needed some one to represent him. The method was suggested by the king's manner of doing business, which he was himself unable to perform. Pollock & Maitland's History Eng. Law, 2d ed. ii. 227. But this legal power to represent another, which became greatly extended in scope, and was made irrevocable under certain circumstances, was always a mere power to take the grantor's place to a limited extent, subject of course to all incident obligations, legal and equitable. If the above be a correct analysis, the court of equity, without interfering in the least with the legal right conferred on the grantee of a power of attorney to represent his grantor, may hold such grantee subject to equities existing against his grantor. The decision in the principal case is then right, and similar results should be reached in the other cases mentioned. Business usage pleads strongly for a different result, and the consequent right to assign choses in action more freely, but the recognition of a greater power conferred by the power of attorney than the right to represent would be too serious a violation of principle for the courts to adopt without legislative authority.

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THE RIGHT TO PRIVACY. — There has existed no explicit authority for the right to privacy since the final decision in *Schuyler v. Curtis*, 147 N. Y. 434. That decision, it is true, was rested on grounds which did not affect the main question, but other recent authorities have denied the existence of any such right. 13 HARV. LAW REV. 415. It is, therefore, interesting to find the appellate division of the New York Supreme Court unequivocally affirming its former doctrine in a case not complicated by any possible breach of contract or confidence. The plaintiff, a young woman, asked for damages and for an injunction against the unauthorized use of her portrait by the defendant in advertising its business. A demurrer to her complaint was overruled. *Roberson v. Rochester Folding Box Co.*, 64 App. Div. 30.

The court rejects the principle that equity interferes only to protect property rights, and cites the cases of dead bodies. These cases would seem to be amply sufficient to dispose of the objection since, it is ad-

mitted, practically on all hands, that there is no property in dead bodies, and yet equity has frequently enjoined interference with them. 15 HARV. LAW REV. 64; *Pierce v. Swan Point Cemetery*, 10 R. I. 227; *Meagher v. Driscoll*, 99 Mass. 281.

It therefore seems superfluous for the court to declare further that the plaintiff's right to control the publication of her likeness may, if necessary, be considered as property. Extreme as the views of the court may appear, it is supported by some *dicta*. *Corliss v. Walker*, 64 Fed. Rep. 280, 282; Gray, J., dissenting, in *Schuyler v. Curtis*, *supra*. Moreover, it is not apparently inconsistent with the numerous cases in which the necessity of property as a basis of jurisdiction has been laid down. The term, property, is nowhere clearly defined, and seems to mean no more than pecuniary interest as distinguished from private feelings. Kerr, *Injunctions*, p. 498; *Emperor of Austria v. Day & Kossuth*, 2 De G., F., & J. 217, 241. Moreover, the "property right" need not be presently profitable; it is enough if it may be so in the future. *Prince Albert v. Strange*, 2 De G. & S. 652, 694; *Gee v. Pritchard*, 2 Swanst. 402. When the word has been extended thus far it seems quite possible to claim its protection for the right to privacy. Almost any right may become pecuniarily profitable to its possessor. Again, if transferability be considered the essential of property, the right in question, granting its existence, seems in its nature quite as assignable as the right in private letters.

If, however, the *dictum* of the principal case were accepted, it might be argued that a man's property right in his features ought to survive him, and the case of *Schuyler v. Curtis*, *supra*, generally regarded as deciding the contrary, would be somewhat weakened. No one denies the desirability of a remedy in this class of cases. If it is to be given without legislation by the courts this should not be done by taking advantage of an elastic phrase, which already means so much that it means nothing.

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STATUTORY RIGHTS OF ADVERTISERS. — A recent unreported Massachusetts decision, *Martin v. Owens Bros.*, has directed attention to a peculiar section of the trademark statute of this Commonwealth, in which provision is made for the registering of a "form of advertisement." Forms of advertisements have long been protected at common law under the rules of unfair competition, in which fraudulent intent, liability to deceive, and probable damage to the complainant are essential, as well as certain technical requirements by analogy to trademarks; but this statute omits all the foregoing requisites, and purports to afford protection to a bare form of advertisement, as such, without pretence of requiring it to indicate origin, proprietorship, or anything arbitrary or distinctive.

The opinion of the court was rendered by Judge Loring, who, after explaining the nature of the advertising device, a "Lucky Penny Pocket Piece," and pointing out that the defendant had deliberately copied the plaintiff's article to get the benefit of the latter's trade, continued: —

"The plaintiff is trying to get the monopoly of manufacturing and selling, as a piece of merchandise, what is called by the counsel an advertising device, and what, to my mind, would be more accurately described as an article of the nature of a 'throw-in' to attract customers. It is used in the same way that advertisements are used, to a certain extent, but does not advertise the plaintiff's goods, profession, work, or anything of

that kind, but is sold to others. The only way that you can get a monopoly on an article of manufacture, as rightly stated by the defendant, is by a patent.

"It is contended that the plaintiff originated certain phrases, . . . and that these phrases have caught the fancy of the people, so that they have become useful to the plaintiff as a means of selling his goods, and that by registering these phrases as an advertising device or 'form of advertisement,' under this statute, he has obtained the right in those phrases which he could not get in them as a trademark. But two difficulties arise which seem to me insurmountable. The plaintiff has no trademark right, because the device has not been used exclusively to denote his manufacture, and there is nothing about it which indicates that it was made by the plaintiff; and the special features cannot constitute such indication, as their value is destroyed as a mark of plaintiff's manufacture because not used exclusively in that connection. There can be no right to the exclusive use of those words or phrases, because they simply make statements of truth or fact. The statute gives a person a right to a form of advertising something of his own. Bill dismissed."

The decision is of value as being the only decision on this particular phase of this unique trademark statute, and because it holds that the designation of origin or ownership and a certain degree of originality are essential, even in a registered "form of advertisement." G. H. M.

**CHOSSES IN ACTION OF A BANKRUPT PASSING TO HIS ASSIGNEES.**—The distribution of a bankrupt's property ratably among his creditors has always been a principal object of bankruptcy legislation. To effect this the statutes have aimed at giving the bankrupt's representatives control of all his valuable rights. By an early enactment the commissioners took what the bankrupt might "lawfully depart withal." 13 Eliz. c. 7. By 5 Geo. II. c. 30, the bankrupt yielded all rights whereby he "hath or . . . may . . . expect any profit, possibility of profit, benefit, or advantage whatsoever." Under such provisions, with the ancient admonition that the acts "shall be . . . largely and beneficially construed . . . for the aid, help, and relief of creditors," 21 Jac. I. c. 19, few valuable rights could be left to the bankrupt.

Nevertheless, apart from statutory exemptions, two kinds of choses in action have never been held to pass to the assignees. Rights deriving their value from future acts of the bankrupt remain to him, because, as Lord Mansfield remarked, "the assignees cannot let out the bankrupt." *Chipendall v. Tomlinson*, Cooke's Bankrupt Laws, 1st ed., 260. By a second qualification, based on principles analogous to the common law rules against maintenance, the bankrupt keeps rights of action for personal damages. *Benson v. Flower*, Sir W. Jones, 215; *In re Haensell*, 91 Fed. Rep. 355.

When one wrongful act injures both the person and the property of the bankrupt, there is considerable difficulty in applying these principles. If the damages arise *ex delicto*, apparently two actions can be brought, unless the result be greatly to harass the wrong-doer. *Brunsdon v. Humphrey*, 14 Q. B. D. 141. In such a case a proper solution would be to allow one action to the assignee and one to the bankrupt. Yet for this no authority has been found except a *dictum* by Lord Bramwell in

*Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127, 144. Where, however, the action is not divisible, probably the jury may be compelled to apportion the damages. Certainly this is true in many American states. 28 Am. & Eng. Enc. of Law, 1st ed. 395. The rules against maintenance to-day would hardly prevent suit on the whole claim by the assignee as trustee for himself and the bankrupt. This procedure appears free from technical and practical difficulties.

A recent English case is interesting as involving these questions. *Rose v. Bucket*, 17 T. L. R. 544. In an action for trespass to land and conversion of goods, the principal damages claimed were for personal annoyance. The trial judge, on application made before the jury were sworn, ordered the action stayed because the plaintiff was adjudged a bankrupt after the action accrued. The court of appeal reversed the decision, saying the "essential cause of action" was the "primary personal injury to the bankrupt." It would seem that on proper motions two actions might have been ordered, or, at least, that the damages might have been apportioned. The decision, however, follows earlier cases in making the character of the main portion of the damages the test of the rights of the bankrupt and his assignees. *Brewer v. Dew*, 11 M. & W. 625. It is to be regretted that the court was unable to find a more accurate rule.

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PUBLICATION OF A LIBEL BY DICTATION TO A STENOGRAPHER. — The court of appeals of Maryland has recently decided that the dictation by the defendant of libellous letters to a stenographer by whom they are subsequently typewritten and transmitted to the plaintiff is a publication of a libel. *Gambrell v. Schooley*, 48 Atl. Rep. 730. In view of the present almost universal method of indirect correspondence the decision is of great importance to the business community. Little authority is to be found directly on the point. An English case is cited in support of the decision, but the Supreme Court of New York has reached an opposite result. *Pullman v. Hill*, [1891] 1 Q. B. 524; *Owen v. Ogilvie Pub. Co.*, 32 N. Y., A. D. 465.

As in the principal case, the plaintiff was the addressee of the libellous letter, the publication if any must have been to the person to whom the words were spoken. Hence the question involved must be distinguished from that raised in two other classes of cases. It is not a case of privileged communication. In those cases the same policy, which demands that the communications be privileged, requires that the method of making them be not narrowly restricted. And if incidentally, in the usual course of communication, a subsidiary publication be made, that too should be privileged. Here, at all events in the absence of malice, there should be no liability. *Boxsius v. Frères*, [1894] 1 Q. B. 842. On the other hand, the cases in which the defendant procures another to publish the former's words are not authorities for the principal case. There is always in those cases a publication of words *after* they have been reduced to writing, and the question is merely as to responsibility. *Pullman v. Hill*, *supra*, falls within this class. The defendant was there liable at all events for the publication to the plaintiff's clerks who read the letter. *Delacroix v. Thevenot*, 2 Stark. 63. The decision, therefore, not necessarily involving the point at issue, lends little support to the principal case.

That there was in the principal case a publication of defamatory words is not doubted, but it is by no means clear that there was a libel at all as distinguished from a slander. Lord Esher defines the publication of a libel as "The making known the defamatory matter after it has been written. . . ." It involves the idea of a manuscript written by the defendant or in his hands, and through his fault communicated to a person other than the one defamed. *Odgers, Libel and Slander*, 3d ed., 170, 171. In the principal case, however, these requirements are not fulfilled. When the words were uttered, no writing was in existence. That was only created subsequently, and then not by the defendant, but by the very person to whom it is contended the libel was published. That there cannot be a publication of a writing that has no existence is obvious. It follows that there was a publication by the defendant of words merely, and that the action should have been for slander and not for libel. *Odgers, Libel and Slander*, 3d ed., 174.

The distinction suggested is technical but it leads to important practical results. A libel is actionable without proof of special damage, but a slander is not unless the words are actionable *per se*. Accordingly, if the proper action is for libel the employer must be held in every case, whereas if for slander, he would rarely if ever be liable, unless the words were actionable *per se*, since he is not as a rule liable for repetitions. *Shurtleff v. Parker*, 130 Mass. 293. Sound public policy demands the latter result. If the law allows a communication to be made it seems sensible that it should be made according to the usual method of transacting business, and the welfare of the business community requires that acts so done shall not become the basis of litigation. On the other hand, it is urged that business necessity must not be made an excuse for licensed defamation. The observance of the distinction between libel and slander here suggested will result in a satisfactory compromise between these extremes. The liability of employers is limited to cases in which ordinary good taste and often common decency would forbid indirect communication, while the general public suffers no undue hardship, since in aggravated cases the action for slander still remains.

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## RECENT CASES.

**ADMINISTRATIVE LAW — CONTRACTS — BOND OF INDEMNITY FOR NOT LEVYING EXECUTION.** — A sheriff was in honest doubt as to whether a *fiery facias*, valid on its face, was issued within the time allowed by law. The defendants gave the sheriff a bond of indemnity with condition to save him harmless in not making the levy. Held, that the bond was valid. *Ray v. McDewitt*, 85 N. W. Rep. 1086 (Mich.).

The current of authority supports the view that an instrument is void if given to indemnify an officer of the court against loss resulting from failure to execute process, which is on its face such as the court could legally have issued. *Denson v. Sledge*, 2 Dev. Law (N. C.) 136; *contra*, *Randle v. Harris*, 6 Yerg. (Tenn.) 508. In such cases, good faith of the officer has generally been held immaterial. *Harrington v. Crawford*, 136 Mo. 467; *contra*, *Joyce v. Williams*, 1 Tayl. (N. C.) 27. To enable courts to enforce their judgments, the law protects an officer in executing a writ good on its face. *FREEMAN, EXECUTIONS*, 3d ed., § 101. When an officer is thus protected, a contract to save him harmless in not obeying the writ encourages disobedience of the order of the court, and therefore is clearly against the policy of the law. A contract to indemnify the officer against the consequences of executing a similar

writ stands on a different footing, and may be valid if made with *bona fide* intention of securing a legal right. *Plackett v. Gresham*, 3 Salk. 75.

**ADMIRALTY — SALVAGE — LIABILITY OF PERSONS BENEFITED.** — Government stores were shipped on a chartered vessel, subject to stipulations under which the charterers were responsible for their safe delivery. The vessel came into collision and required salvage assistance. The salvors, after refusal of compensation by the government, brought an action *in personam* against the charterers. *Held*, that the action lies. *The Cargo ex Port Victor*, [1901] P. D. 243.

The decision represents the tendency to follow equitable rather than common-law principles in the administration of maritime law. *The Juliana*, 2 Dods. 504, 520, 521. The salvors, having neglected to pursue their action *in rem* against the stores, and being unable to proceed *in personam* against the government, would lose their reward unless enabled to reach the defendants; and the latter, although not holding the legal title, have enjoyed the benefit of the salvage services by reason of their responsibility for the safety of the property salvaged. The decision, in holding that liability to the salvors' claim is not confined to the legal owners, but extends to persons interested in the preservation of the property, follows the case of *The Five Steel Barges*, 15 P. D. 142. Difficulty, however, may be found in defining interests liable for salvage services. A Scottish decision has allowed salvage against a common carrier. *Duncan v. The Dundee, etc., Co.*, 15 Scot. L. R. 420. Insurers and bottomry bondholders would seem to be equally liable, while the cases of mortgagees and lienholders may properly be distinguished. No decisions except those cited have been found.

**AGENCY — RATIFICATION — UNDISCLOSED PRINCIPAL.** — One Roberts, intending to act in behalf of the defendants, but without their authority and without professing to act as an agent, entered into a contract with the plaintiff. *Held*, that the defendants could not ratify Roberts's act, so as to become privy to the contract. *Keighley, Maxsted & Co. v. Durant*, [1901] A. C. 240. See NOTES, p. 221.

**BANKRUPTCY — PREFERENCES — SURRENDER A CONDITION OF PROVING CLAIM.** — In the usual course of business, creditors received payments from an insolvent debtor, against whom a petition in bankruptcy was filed within the four months succeeding. *Held*, that under the act of 1898 these payments must be surrendered before proof for the remainder of the creditors' claim can be allowed. *Pirie v. Chicago Title & Trust Co.*, 21 Sup. Ct. Rep. 906.

This case, in which the Supreme Court follows a majority of the previous decisions of the lower courts, is noteworthy as marking a departure in bankruptcy law. *In re Ratcliff*, 107 Fed. Rep. 80; *BRANDENBURG, BANKR.*, 2d ed. 520. The law of preferences began with Lord Mansfield's decisions holding certain payments voidable by a bankrupt's assignees as fraudulent and illegal. The novel doctrine was strictly limited by English courts and slowly extended by Parliament. *LOWELL, BANKR.*, ch. v. Preferences received by a creditor having no reasonable cause to believe a preference was intended have probably never been illegal in England, and the surrender of legal preferences never a condition of proving remaining claims. See *In re Hall*, 2 N. B. N. Rep. 1126. Until the present act the law in the United States relating to preferences was in this respect substantially like contemporaneous English law. The statute of 1898 provides (§ 57 *g*) that "The claims of creditors . . . shall not be allowed unless . . . [they] surrender their preferences." This unambiguous clause seems to cover preferences received as payments in the usual course of business. Although the result is unsatisfactory in practice the defect in the act is properly one for the legislature to remedy.

**BANKRUPTCY — PROPERTY PASSING TO ASSIGNEES — CHOSES IN ACTION.** — In an action for trespass to land and conversion of goods the principal damages claimed were for personal annoyance. On motion made before the jury was sworn, the trial judge ordered the action stayed, because the plaintiff had been adjudged a bankrupt after the suit was begun. *Held*, that the ruling was incorrect, on the ground that such an action does not pass to the plaintiff's assignees in bankruptcy. *Rose v. Bucket*, 17 T. L. R. 544 (C. A.). See NOTES, p. 229.

**BANKRUPTCY — PROVABLE CLAIMS — CONTINGENT LIABILITIES.** — *Held*, that the present value of an annuity, calculated by life-tables, is a claim provable in bankruptcy. *Cobb v. Overman*, 109 Fed. Rep. 65 (C. C. A., Fourth Circ.).



A petition in bankruptcy against an indorser of a promissory note was filed before the note matured. *Held*, that the holder's claim against the indorser is provable in bankruptcy. *Mock v. Market St. Nat. Bank*, 107 Fed. Rep. 897 (C. C. A., Third Circ.).

Although modern bankruptcy legislation aims to discharge all liabilities save those excepted because of public policy, express provisions for proving all contingent claims capable of present valuation are omitted, perhaps inadvertently, from the act of 1898. The act therein differs from the acts of 1841 and of 1867, and from modern English statutes. See 14 HARV. LAW REV. 372. However, § 63a (4) of the act of 1898, providing that "debts . . . may be proved . . . which are . . . founded upon an open account or upon a contract express or implied," if liberally interpreted would probably include most contingent liabilities. Unfortunately, clauses relating to provable claims have usually been construed very narrowly, frequent protests of judges and text-writers notwithstanding. *Ex parte Groome*, 1 Atk. 114; LOWELL, BANKR. §§ 164 *et seq.* But in the principal cases the federal courts are not bound directly by authority, as exactly the same question could not arise under the act of 1841 or of 1867, and apparently did not under the act of 1800. *Cf. Marks v. Barker*, 1 Wash. C. C. 178. Accordingly, although the cases depart from the former spirit of construing similar clauses, neither the result nor the process of reaching it is much to be regretted.

CONFLICT OF LAWS — BILLS AND NOTES — CAPACITY. — A married woman, domiciled in New Jersey and there incapable of contracting, made in that state a note payable to her husband for his accommodation, and he negotiated the note in New York, where the wife was under no incapacity. *Held*, that New York is the place of contract and its law applies. *Thompson v. Taylor*, 49 Atl. Rep. 544 (N. J., C. A.).

Though the state of the English law is rather doubtful, in America it is well settled that the *lex loci contractus* controls capacity to contract. *Bowles v. Fields*, 78 Fed. Rep. 742; see 10 HARV. LAW REV. 168. There is some authority for applying the *lex domicilii* where the person whose capacity is in question, being in his own state, has procured the contract in another state by agent. *Freeman's Appeal*, 68 Conn. 533. According to the better opinion, however, these cases should form no exception to the general rule. *Milliken v. Pratt*, 125 Mass. 374. The result in the principal case may be reached in two ways. There is authority for holding that accommodation paper has no validity till negotiation. *Whitten v. Hayden*, 7 Allen, 407. The other view finds an obligation, but a defence of a strictly personal character in favor of the maker. *Moore v. Baird*, 30 Pa. St. 138, *semble*. If the note has no validity till negotiation, the principal case is clearly right. Under the second view, the note, by reason of the incapacity, is worthless till carried out of New Jersey, but the maker, having authorized a negotiation of it in New York, has in effect adopted it there by agent as her note and cannot rely on her New Jersey incapacity against a New York holder.

CONTRACTS — CONSTRUCTION — "ENGAGE AND EMPLOY." — By a contract in writing the defendant "agrees to engage and employ" the plaintiff for a fixed term as a representative salesman and "further agrees to remunerate him." The plaintiff was dismissed from service but the stipulated salary was offered him. *Held*, that no action lies for breach of the contract. *Turner v. Sawdon*, 49 W. Rep. 712 (Eng., C. A.).

No authority has been found exactly in point. "Employ" may mean either to provide actual work, or to retain in service without being bound to provide work, as when a family physician is employed at an annual salary. See *Emmens v. Elderton*, 4 H. L. Cas. 624. In either case the court's decision that the contract is fulfilled by mere payment would seem unsound. Ordinarily if wages are paid the employee would suffer no damages by dismissal, but this would not always be true. Thus, to employ an actor imports the obligation to give him opportunity to appear before the public. *Fechter v. Montgomery*, 33 Beav. 22, 26; *Bunning v. Lyric Theatre*, 71 L. J. Rep. 396. Similarly there might be cases where the loss of business connection with the employer would be a substantial injury. It would seem therefore that in the absence of evidence to the contrary the parties should be presumed to have used "employ" in accordance with the probable business understanding of the word, and that in severing all connection between himself and the plaintiff, the employer broke his contract.

CORPORATIONS — ULTRA VIRES — UNAUTHORIZED USE OF REAL ESTATE. — A corporation, empowered to erect and operate safety-deposit vaults and authorized to possess real estate necessary for the transaction of its business, built a fourteen-story

office-building which contained but one safety-deposit vault. *Held*, that the lessee of a room in the building could not plead *ultra vires* in an action to recover rent, since that plea can be interposed in a collateral proceeding only when the corporation is alleged to have performed an act which it was not under any circumstances authorized to perform. *Rector v. Hartford Deposit Co.*, 60 N. E. Rep. 528 (Ill.).

The mere fact that a corporation has acquired more real estate than its charter authorizes does not annul its title. *Fayette Land Co. v. Louisville, etc., R. R. Co.*, 93 Va. 274, 285 *et seq.*; *Mallett v. Simpson*, 94 N. C. 37. If its holdings, however, are clearly in excess of what is authorized by its charter, the state may interfere. *People v. Pullman's, etc., Co.*, 175 Ill. 125, 142. The usurpation of unauthorized functions in the principal case would seem to be sufficient to justify such action by the state, and almost enough to fulfil the requirements laid down by the court for a collateral attack. The tendency of recent decisions, however, has been to limit the scope of the plea of *ultra vires* and to refuse on equitable grounds to allow it when one party has received the entire benefit of the contract and seeks to avoid assuming the burden. *Bath Gas-light Co. v. Claffy*, 151 N. Y. 24, 36. The result reached in the principal case seems clearly right, though this latter ground is perhaps a more satisfactory basis of decision than that given by the court.

CRIMINAL LAW — HUSBAND AND WIFE — PRESUMPTION OF MARITAL COERCION. — A wife was indicted for carrying a weapon into a jail with intent to facilitate the escape of her husband. *Held*, that the offence was committed in the husband's presence and that the presumption of coercion thus arising is not rebutted by the circumstance of the husband's imprisonment. *State v. Miller*, 62 S. W. Rep. 692 (Mo.).

With the modern development of the rights of married women all satisfactory reason for the presumption of marital coercion has disappeared, and courts have shown a commendable tendency to limit the rule, until little of it remains. STEPHEN, DIG. CRIM. LAW, 5th ed., 399; *United States v. De Quilfeldt*, 2 Cr. L. Mag. 211. So far from following this tendency, the principal case seems to be an unwarrantable extension of the doctrine. The intention was formed, the execution of the crime begun and all but completed outside the jail, and the fact that the defendant came into her husband's actual presence simultaneously with the completion of the crime can hardly justify the presumption in question. *Quinlan v. People*, 6 Parker, C. C. 1. If, on the other hand, the presumption is raised out of a constructive presence, it was for the jury to determine whether she was so far within the range of his control as to afford ground for presuming coercion. *Commonwealth v. Daley*, 148 Mass. 11. Even if coercion could be presumed, slight circumstances will rebut it, and the jury should have been allowed to decide whether the husband's helpless situation was sufficient to do so. *Cf. Reg. v. Pollard*, 8 C. & P. 553.

CRIMINAL LAW — LARCENY — INNOCENT AGENT. — The defendant pointed out and, without taking possession, purported to sell to an innocent purchaser, a horse which he did not own. Later the purchaser took possession of the horse in an adjoining county. *Held*, that the defendant was guilty of larceny in the latter county. *Walls v. State*, 63 S. W. Rep. 328 (Tex. Cr. App.).

Cases exactly parallel seem to be almost entirely confined to the state of Texas. On similar facts the same court formerly reached an opposite conclusion, holding that there was no larceny because possession of the property was not taken by the accused. *Lott v. State*, 20 Tex. Cr. App. 230. This case, however, was immediately overruled, and the doctrine of innocent agent rightly applied. *Doss v. State*, 21 Tex. Cr. App. 505. The fraudulent sale of another's property does not of itself make the seller guilty of larceny. *Hardeman v. State*, 12 Tex. Cr. App. 207. But as soon as actual possession is taken by the innocent purchaser the crime is complete. The taking by the purchaser is coupled with the *animus furandi* of the seller, for the law, to avoid the anomaly of a crime without a criminal, makes the act of the innocent agent the act of the principal. 1 BISH. CRIM. LAW, 7th ed., § 651; *People v. Adams*, 3 Denio 190. Although the instances in which this doctrine has been applied to larceny are few, its applicability has long been recognized. 2 EAST, P. C. 555.

DIVORCE — FOREIGN DECREE — DOMICIL — JURISDICTION. — In a suit for divorce the respondent set up a previous divorce obtained by himself in another state. The court found from the evidence that he had not acquired such *bona fide* residence in the other state as to give its courts jurisdiction under the laws of that state. *Held*, that the foreign decree is not entitled to faith and credit. *Bell v. Bell*, 21 Sup. Ct. Rep. 551. See NOTES, p. 66.

**EQUITY — INJUNCTION — PERSUADING ANOTHER TO BREAK HIS CONTRACT.** — The plaintiff's apprentices were under contract not to connect themselves with trade unions. The defendant had persuaded some of them and was persuading others to join his union. *Held*, that the defendant was properly enjoined from further endeavoring to persuade the apprentices to join a union. *Flaccus v. Smith*, 48 Atl. Rep. 894 (Pa.).

The doctrine that a tort liability exists for persuading a third person to break a contract with the plaintiff, is probably established in England. *Lumley v. Gye*, 2 E. & B. 216. It has generally but not universally been accepted in this country. *Bixby v. Dunlap*, 56 N. H. 456; *contra*, *Boyson v. Thorn*, 98 Cal. 578. The principal decision is interesting as apparently the first application of the remedy of injunction to this kind of case, and will probably be followed in those jurisdictions where the doctrine of *Lumley v. Gye*, *supra*, prevails. The inadequacy of the legal remedy is the test that determines the right to an injunction. *Mayor, etc., v. Gardner*, 33 N. J. Eq. 622. The acts of the defendant constituted repeated injuries to the contract rights of the plaintiff, and to put him to his legal remedy would be to compel him to bring a number of small actions. The analogy is strong to repeated trespasses upon land, where equitable relief is allowed. *Cf. Mills v. New Orleans Seed Co.*, 65 Miss. 391. Moreover the damage suffered by the plaintiff from the unionizing of his apprentices, while real and substantial, is extremely difficult of pecuniary estimation. This also entitles him to equitable relief. *Myers v. Kalamasoo Buggy Co.*, 54 Mich. 215.

**EQUITY — RIGHT TO PRIVACY — USE OF PORTRAIT.** — *Held*, that a demurrer to a complaint asking for an injunction against the unauthorized use of the plaintiff's portrait for advertising purposes was rightly overruled. *Roberson v. Rochester Folding Box Co.*, 64 N. Y. App. Div. 30. See NOTES, p. 227.

**ESTOPPEL — REPRESENTATION INDUCED BY TRICK — ABSENCE OF INTENT TO DECEIVE PLAINTIFF.** — Z., owing money to the plaintiff, promised to deposit it with the defendant. Without making a deposit, Z. induced the defendant to give the plaintiff a fictitious credit, the defendant believing Z.'s assertion that the plaintiff understood the arrangement. The plaintiff, however, relied on this credit to his damage, and now sues the defendant for the amount of the credit. *Held*, that the defendant is not estopped to deny the genuineness of the credit. *Modern Woodmen v. Union Nat. Bank*, 108 Fed. Rep. 753 (C. C. A., Eighth Circ.).

One who makes false representations to another, intending that they be acted upon in a certain way, is estopped to set up the truth to the injury of that other after he has so acted. *Parlin v. Stone*, 48 Fed. Rep. 808. This rule prevails even though the representation is induced by the trick of a third person. *In re Bahia*, L. R. 3 Q. B. 584. Furthermore, an intention to cause the action produced, or even to cause the plaintiff to act at all, is not necessary; if the natural and probable result of the representation is a detrimental change of position by the plaintiff, the rule of estoppel applies. *Seton v. Lafone*, 19 Q. B. Div. 68; *Caswell v. Fuller*, 77 Me. 105. The principal case seems to come within the above rules, and the defendant therefore should be estopped. *Cornish v. Abington*, 4 H. & N. 549. The court was undoubtedly the less willing to find an estoppel, since the plaintiff's actual injury was slight, whereas the damages in such case, according to the settled rule, would be the amount he would have received if the representation had been true. *Casco Bank v. Keene*, 53 Me. 103. See EWART ON ESTOPPEL, p. 191.

**EVIDENCE — PEDIGREE — DECLARATIONS OF FOSTER PARENTS.** — On the question whether A was the father of B, the plaintiff offered declarations of B's foster parents, since deceased, who were not related to A or B. *Held*, that the declarations were admissible. *Alston v. Alston*, 86 N. W. Rep. 55. (Ia.).

Anciently, on pedigree questions, general community reputation was allowed; later, only declarations from those in the family or otherwise specially fitted to speak. HUBBACK, EVID. SUC. 653. See *Whitelocke v. Baker*, 13 Ves. Jun. 511, 514. The rule settled for England nearly a century ago confines the class of declarants to those related by blood or closely by marriage to one whose pedigree is in question. *Johnson v. Lawson*, 2 Bing. 86. If this rule, justly recommended as at once certain and intelligible, is to be relaxed at all, the declaration in the principal case is, in reason, admissible. Many American courts, while excluding declarations of mere neighbors or acquaintances, attempt to rationalize the English restriction by language approving declarations of all persons who, having lived in the family, may be supposed to know.

*Chapman v. Chapman*, 2 Conn. 347. These *dicta* are disapproved by as many others. *Flora v. Anderson*, 75 Fed. Rep. 217, 222. One decision, though not mentioning the point, and incorrect for another reason, involves an affirmation of the English rule. *Blackburn v. Crawfords*, 3 Wall. 175. That the principal case is, unfortunately, *contra* illustrates the unsatisfactory technical nature of the law of evidence for present day purposes, and the desirability of a scientific restatement.

**EVIDENCE — PEDIGREE — STATUTES OF INHERITANCE OF BASTARDS.** — On an issue of descent under a statute which makes a bastard heir of his father, the plaintiff offered hearsay declarations that the late owner of the property claimed was his father. *Held*, that the declarations were within the pedigree exception to the rule against hearsay. *Alston v. Alston*, 86 N. W. Rep. 55 (Ia.).

The pedigree exception as it has always existed in England, serves to admit declarations of family matters only when bearing on some question of legitimate relationship. *Crispin v. Dogliani*, 3 Sw. & Tr. 44. American courts, less strict, incline to admit declarations on any matter of family history which is relevant to any question in the case. *In re Hurlburt's Estate*, 68 Vt. 366. *Contra*, *Town of Union v. Town of Plainfield*, 39 Conn. 563. This practice, traceable to a misleading passage in Greenleaf, is defended to-day as within the spirit of the exception; since in respect to the trustworthiness of the evidence, there is no rational distinction between pedigree cases in the narrow sense and others. 1 GREENL. EV., 16th ed., § 114 g. An answer, aside from authority, is that this exception to the rule excluding hearsay is technical, not rational, and without any "spirit" to extend. The principal case might be supported on the ground that the statute creates a pedigree relationship. *Northrop v. Hale*, 76 Me. 306. But in interpreting these statutes the better rule is that they do no more than they purport; they merely give bastards lineal inheritance. *Stevenson's Heirs v. Sullivan*, 5 Wheat. 207, 260. In this view they no more affect relationship than would like statutes providing for inheritance by servants. A contrary decision in the principal case would therefore have been more satisfactory, and would have rested on good authority. *Flora v. Anderson*, 75 Fed. Rep. 217.

**FIXTURES — CONDITIONAL SALE OF FURNACE — REAL ESTATE MORTGAGE — PURCHASER AT FORECLOSURE SALE.** — A furnace, sold and installed under a contract providing for its return if not up to requirements, was in fact below the standard. The defendant bought the premises at a foreclosure sale under a real estate mortgage, given before the furnace was installed. *Held*, that the furnace passed with the realty to the purchaser, though it had retained its chattel character as between vendor and mortgagor. *Fuller-Warren Co. v. Harter*, 85 N. W. Rep. 698 (Wis.).

The court rests its decision on the Massachusetts doctrine that all chattels affixed to realty go to a prior real estate mortgagee, contract or chattel mortgage between vendor and mortgagor notwithstanding. *Clary v. Owen*, 15 Gray 522. According to the more equitable theory of Vermont and New Jersey, the prior real estate mortgagee is not preferred to the holder of an incumbrance on a chattel affixed to the realty subsequently to the mortgage, unless the removal of the fixture would decrease the original value of the mortgage security. *Davenport v. Shants*, 43 Vt. 546; *Campbell v. Roddy*, 44 N. J. Eq. 244. It does not appear that the defendant at the time of purchase knew of the contract concerning the furnace. If he did not, the result may be supported on the ground that the position of the defendant is stronger than that of the mortgagee. The latter advanced no money relying on the fixture as security; the former, buying the premises as they stood, would be in effect a purchaser for value without notice, and as such should be protected. This distinction seems never to have been drawn by the courts. See 10 HARV. LAW REV. 190.

**INTERNATIONAL LAW — EFFECT OF CESSION ON EXISTING LAWS — IMPORT DUTIES.** — Under orders issued by the President, duties were collected on goods imported by the plaintiff into Porto Rico from the United States, after the cession of that island, and before the passage of the act of Congress establishing a Porto Rican tariff. *Held*, that the goods were entitled to entry free of all duties. *Dooley v. United States*, 21 Sup. Ct. Rep. 762. See NOTES, p. 220.

**INTERNATIONAL LAW — ENEMY CHARACTER — DOMICILE OF CORPORATION.** — A mining company incorporated in Natal was granted letters of incorporation in the Transvaal, where its mine was situated, and was registered in Pretoria. After the outbreak of war the company shut down the mine, intending not to work it durin-

the war, but kept its property and retained its resident manager. *Held*, that the company had only a commercial domicile in the Transvaal, and that this did not invest it with enemy character. *Nigel Gold Mining Co., Lim. v. Hoade*, 17 T. L. R. 711.

The status of the corporation and not that of its members was in question, and in the case of corporations, as in that of individuals, enemy character is determined by domicile. *Society, etc., v. Wheeler*, 2 Gall. 105, 131; *The Danckebaar Africaan*, 1 Rob. 107. Even if the plaintiff company be regarded as merely commercially domiciled, it takes enemy character on the outbreak of war, for when a foreign corporation establishes a permanent agency in a state, it is, in time of war, as to the business transacted there, in the same position as a domestic corporation. *Martine v. International Life Ins. Soc.*, 53 N. Y. 339. Yet the law covering such a company as the plaintiff in the principal case is stronger still. An incorporated company which takes letters of incorporation in a second state, has a separate legal domicile in that state. *Martin v. Baltimore & Ohio R. R. Co.*, 151 U. S. 673. The plaintiff company must therefore be regarded as having enemy character. The court professes to bring the case within the rule of *The Venus*, 8 Cranch 253. In that case the owner had abandoned his foreign domicile and business *bona fide*; but in the principal case there was nothing equivalent to such abandonment by the corporation. The decision can be explained only by the supposed humanitarian tendency of the present day in applying the rules of war.

INTERNATIONAL LAW — INSURANCE BY DOMESTIC COMPANY ON ENEMY PROPERTY. — PUBLIC POLICY. — Gold, the property of a Transvaal mining company, was insured with British underwriters against capture, amongst other risks, during transit from the mines in the Transvaal to the United Kingdom. The gold was seized by the government of the Transvaal, at a time when the Transvaal troops were in the field, and war was imminent, though before the declaration of war. Action was brought on the policy. *Held*, that the insurance of the plaintiff's property against such a seizure was not against public policy and the action is maintainable. *Driefontein, etc., Mines, Lim. v. Janson*, [1901] 2 K. B. 419.

Acts done in contemplation of war are, if war ensues, regarded as if done in time of war. *The Jan Frederick*, 5 Rob. 128; *The Boedes Lust*, 5 Rob. 233. The question, then, is whether it is against public policy for an insurance company to insure an alien enemy against seizure of his property by his own government. No decided case covers this. It has been held that insurance of an enemy's subject against capture of his goods by ships of the insurer's government is void. *Furtado v. Rogers*, 3 B. & P. 191; *Gamba v. Le Mesurier*, 4 East 407. The ground of the decisions was that a state could not put the same pressure on its enemy if the enemy knew it would be recouped at the end of the war by subjects of that state. This principle applies with equal if not greater force to insurance on goods seized by the government of the assured. Payment of such insurance would be relieving the enemy's subject from the pressure put upon him by his own government to carry on the war, and would in effect be paying the enemy's expenses. On principle and authority the case is wrong, though it has the practical advantage of affording relief to commerce.

INTERSTATE COMMERCE — UNREASONABLE DISCRIMINATIONS — JURISDICTION OF STATE COURT. — *Held*, that unreasonable discrimination by an interstate telegraph company is unlawful at common law and that the state court has jurisdiction. *Western Union Tel. Co. v. Call Publishing Co.*, 21 Sup. Ct. Rep. 561. See NOTES, p. 224.

PROPERTY — FIXTURES — ELECTRIC LIGHT FITTINGS. — *Held*, that where a hotel containing electric light fittings is sold under foreclosure, the fittings pass as a part of the realty. *Canning v. Owen*, 48 Atl. Rep. 1033 (R. I.).

There is considerable confusion as to what chattels annexed to the realty will pass as fixtures. The view most generally held is that, as between vendor and vendee, or mortgagor and mortgagee, whatever is annexed to the freehold by the owner with the intention that it be used and enjoyed permanently in connection therewith, passes with a conveyance of the realty. *Holland v. Hodgson*, L. R. 7 C. P. 328. In most American jurisdictions and in Scotland an exception has been made of gas fittings, and similarly of electric light fittings, which are considered personality. *Vaughen v. Haldeman*, 33 Pa. St. 522; *Nisbet v. Mitchell-Innes*, 7 R. 575. In England and in Kentucky the decisions are in accord with the principal case. *Sewell v. Angerstein*, 18 L. T. N. S. 300; *Johnson's Exec. v. Wiseman's Exec.*, 4 Met. (Ky.) 357. The prevailing view seems to rest on an analogy drawn in an early case between gas fittings and lamp-brackets, which had always been considered personality. *Montague v. Dent*, 10

Rich. (S. C.) 135. On principle there seems no good reason for thus making gas and electric light fittings an exception to the general rule; but the law in America is so well settled that the departure in the principal case is unfortunate.

PROPERTY — QUASI-EASEMENTS — ESTOPPEL. — One H., owning a lot with a building thereon, conveyed it by metes and bounds to X. The building was found to project six inches upon the adjoining lot. H. afterwards purchased a strip from this lot including the portion upon which the house projected. *Held*, that X is entitled to an easement in that portion for the support of the building. *Swedish-American, etc., Bank v. Connecticut, etc., Ins. Co.*, 86 N. W. Rep. 420 (Minn.).

Had H. been the owner of both lots at the time of the conveyance to X, the latter would have gotten the easement claimed under the doctrine of *quasi-easements*, the servitude being continuous, apparent, and necessary for the convenient use of the property granted. *Palmer v. Fletcher*, 1 Lev. 122; *Simmons v. Cloonan*, 81 N. Y. 557. The decision here seems to result from a union of this principle with the doctrine of estoppel as applied to subsequently acquired title. See *Somes v. Skinner*, 3 Pick. 52. Only two cases have been found raising the same question. One is in accord with the principal case. *Jarnigan v. Mairs*, 1 Humph. (Tenn.) 473. The other, a very recent decision, takes the opposite view. *Farley v. Howard*, 60 N. Y. App. Div. 193. The doctrine of the principal case seems sound and the result eminently desirable.

PROPERTY — RIPARIAN OWNERS — RIGHT TO RESTORE NATURAL LEVEL. — The defendant acquired a prescriptive right to maintain a milldam and pond back the water. The plaintiffs, upper riparian owners, had improved their land in reliance on the permanency of the pond. *Held*, that an injunction will lie restraining the defendant from removing the dam to the injury of upper owners. *Kray v. Muggli*, 86 N. W. Rep. 882 (Minn.).

There is little authority exactly in point and the case most nearly parallel is *contra*. *Yale v. Brace*, 99 Mass. 448. But in analogous cases, such as restoration of a stream previously diverted into an artificial channel, the weight of authority supports the principal case. *Delany v. Boston*, 2 Har. (Del.) 489. The decisions are based on the ground either of a reciprocal easement in the servient tenement, or of an equitable estoppel against the dominant. The former reason is unsatisfactory because the servient owner does nothing adverse by which an easement might be acquired; the latter because the representation relied on is not one of existing fact, but merely of intended future conduct. See *Mason v. Shrewsbury Ry. Co.*, L. R. 6 Q. B. 578, 587. Perhaps the correct basis for the satisfactory result in the majority of the cases is that it is not equitable to allow the dominant owner alone the right to insist on the maintenance of the changed conditions, and the law therefore substitutes them for the natural conditions and gives abutters the usual riparian rights. Cf. *Woodbury v. Short*, 17 Vt. 387.

PROPERTY — VENDOR AND PURCHASER — PURCHASER'S LIEN. — The plaintiff contracted to purchase a plot of land from X, paying a deposit and receiving an option in a certain event to cancel the contract. This option he afterwards exercised. *Held*, that the plaintiff had a lien on the land for his deposit, enforceable against the defendant, who had acquired X's title with notice of the contract. *Whitbread & Co., Lim. v. Watt*, [1901] 1 Ch. 911.

Equity purposes to treat all parties with equal justice, giving to each when possible the same remedy. For this reason the vendor and vendee of land have the same right of specific performance, and similarly equity has allowed the purchaser, as well as the vendor, a lien on the land contracted to be sold. *Wythes v. Lee*, 3 Drewry 396; *Bullitt v. Eastern Ky. Land Co.*, 99 Ky. 324. See 9 HARV. LAW REV. 486. There is a *dictum* that the purchaser's lien exists only when the contract is off by the vendor's default. *Roger v. Harrison*, [1893] 1 Q. B. 161, 173. This seems unsound. Just as the vendor's lien always accompanies his contractual claim for the purchase money, the purchaser's lien should be allowed whenever he has a *quasi-contractual* claim to have his deposit refunded. Apparently the weight of authority holds that the deposit is forfeited if the vendee later makes default. *Howe v. Smith*, 27 Ch. D. 89. When, however, the contract fails to be performed for any other reason, the purchaser has a claim for the deposit, and a lien should be allowed. In reaching that conclusion the principal case follows *Rose v. Watson*, 10 H. L. Cas. 672.

SALES — CONDITIONAL SALE — RE-SALE BY VENDOR TO HIMSELF. — The plaintiff contracted to sell to the defendant certain personalty, the title not to pass till

the price was paid. The defendant having refused to perform, the plaintiff, after proper proceedings, had the property sold at auction, and bid it in himself. He then sued to recover the difference between the contract price and the sale price. *Held*, that the plaintiff is entitled to recover. *Ackerman v. Rubens*, 167 N. Y. 405.

The correctness of the measure of damages adopted obviously depends upon the validity of the resale. Undoubtedly if the plaintiff did not choose to keep the property himself, he had a right to sell it and recover from the defendant the difference between the price obtained and the contract price. *Dunstan v. McAndrew*, 44 N. Y. 72. But it seems that the plaintiff had no right to buy at the sale, which was therefore not valid. The position of the plaintiff in reselling the property is similar to that of a pledgee or mortgagee with power of sale; in each of the three cases the creditor has a right to sell for his own protection, in case of default by the debtor. But it is well settled that a pledgee or mortgagee selling under a power of sale may not bid in the property. *Middlesex Bank v. Minot*, 45 Mass. 325; *Harper v. Ely*, 56 Ill. 179. The reason is that it is not safe to allow such purchases, on account of the chances of fraud, and therefore, though there may have been no fraud in the particular case, the sale should be held invalid. The same reason applies in the principal case. The basis on which the damages were assessed, therefore, is not established.

**SALES — NON-NEGOTIABLE BILLS OF LADING — RIGHTS OF ASSIGNEE.**—The seller delivered goods to a railroad company consigned to the buyer, and took in the name of the buyer a bill of lading marked "not negotiable." The bill of lading, with a draft on the buyer, was transferred to a bank, to be delivered to the buyer on acceptance of the draft. *Held*, that the delivery to the carrier passed the absolute title to the buyer, and the bank had no rights in the goods. *Bank of Litchfield v. Elliott*, 86 N. W. Rep. 454 (Minn.).

Ordinarily whenever a bill of lading is retained by the consignor, he has a right over the goods in the nature of a lien or mortgage, and the consignee, until he receives the bill of lading, has no right to obtain the goods or dispose of them, being liable to the consignor or the assignee of the bill of lading for so doing. *Cayuga, etc., Bank v. Daniels*, 47 N. Y. 631; *Freeman v. Kraemer*, 63 Minn. 242; *Alderman v. Eastern R. R. Co.*, 115 Mass. 233. When, however, goods are shipped directly to the buyer, and a non-negotiable bill of lading taken out in his name, the common practice of railroads seems to be to deliver the goods to the consignee without requiring the presentation of the bill of lading, and relying upon this custom it has been decided that the assignee of such a bill of lading had no rights against the consignee. *Forbes v. Boston & Lowell R. R. Co.*, 133 Mass. 154, 157. If this is in fact a general custom, the sooner its legal effect in cases like the principal one is clearly made known to the mercantile community the better, and the decision in the principal case is therefore to be welcomed.

**STATUTE OF FRAUDS — ANTE-NUPTIAL AGREEMENT — MEMORANDUM.**—By an oral ante-nuptial agreement a husband agreed to convey to trustees, when it should come into possession, a reversion belonging to his wife, to be held on certain trusts which, under a voluntary settlement, would not be valid as against creditors. In a post-nuptial writing the husband recited and covenanted to perform the oral agreement. He afterwards became bankrupt. *Held*, that, one agreement being oral and the other gratuitous, the trustee in bankruptcy will not be ordered to perform. *In re Holland*, [1901] 2 Ch. 145.

According to the prevailing English view and considerable American authority, a settlement after marriage conveying property in execution of an oral ante-nuptial agreement is void as against creditors. *Warden v. Jones*, 2 De G. & J. 76. In several jurisdictions, however, such settlements have been allowed. *Hussey v. Castle*, 41 Cal. 239. And in analogous cases the performance of a moral duty of this kind is usually held good against creditors. *Brown v. Lunt*, 37 Me. 423. Under the first mentioned rule, even when the settlement recites the former agreement, it is generally held invalid. *Winn v. Albert*, 5 Md. 66; *Trowell v. Shenton*, L. R. 8 Ch. D. 318, *semble*. The principal decision follows naturally from these cases. Yet in all such cases the recital seems to supply the necessary memorandum to validate the original contract, and an English case which, though it did not involve creditors, relied on the authority of cases which did, held a written acknowledgment after the marriage a sufficient memorandum. *Barkworth v. Young*, 4 Drewry 1. The principal decision seems especially unfortunate, since the memorandum was made directly after marriage and twenty-five years before bankruptcy, so that there could have been no fraud on creditors, the danger of which seems to be the ground of the decisions in the settlement

cases. No reason appears, therefore, for refusing to enforce the agreement, even if the court was unwilling to accept the rather advanced view adopted in *Missouri*, that marriage is sufficient part performance to make the contract binding. *Nowack v. Berger*, 133 Mo. 24. See 10 HARV. LAW REV. 60.

**TORTS — CIVIL LIABILITY FOR DAMAGE CAUSED BY CRIMINAL ACTS.** — The defendant, while beating his horse with a pointed stick, slipped and thereby accidentally struck the plaintiff. *Held*, that the jury should have been instructed that if the defendant was breaking a statute forbidding cruelty to animals, he was liable for damage directly resulting to the plaintiff, whether or not it ought reasonably to have been foreseen. *Osborne v. Van Dyke*, 85 N. W. Rep. 784 (Ia.). See NOTES, p. 225.

**TORTS — LIABILITY FOR INCREASING BURDEN OF CONTRACT — SUBROGATION.** — The defendant negligently injured a bridge, which the plaintiff was under bonds to the county to keep in repair. The plaintiff repaired the bridge, and sued the defendant. *Held*, that the injury was done to the plaintiff and that he was entitled to recover the cost of repairing the bridge. *Cue v. Breland*, 29 So. Rep. 850 (Miss.).

The decisions exactly in point are uniformly opposed to the position of the court. *Rockingham, etc., Ins. Co. v. Bosher*, 39 Me. 253; but *cf. McNary v. Chamberlain*, 34 Conn. 384. It is obvious that no property interest is acquired in a chattel by undertaking to indemnify the owner in case of its loss, and to place tort-feasors under a liability to all who may be damaged by reason of contractual relations with the party whose person or property is directly injured, would work a dangerous extension of legal responsibility by opening a wide and uncertain field of litigation. *Connecticut, etc., Ins. Co. v. New York, etc., R. R. Co.*, 25 Conn. 265. The interests of the plaintiff, like those of an insurer, are amply protected by his privilege of subrogation. He has an enforceable right to bring an action in the name of the owner of the property (or under code provisions, in his own name) and reimburse himself out of the damages for the loss he has sustained. *Hart v. Western R. R. Corporation*, 54 Mass. 99. The court in the principal case, while doing substantial justice, disregards principles which in analogous cases might entirely change the result. *Cf. Midland Ins. Co. v. Smith*, 6 Q. B. Div. 561.

**TORTS — LIBEL — PUBLICATION BY DICTATION TO A STENOGRAPHER.** — The defendant dictated a libellous letter to his stenographer, who subsequently wrote it with a typewriter and transmitted it by the defendant's direction to the person libelled. *Held*, that there was a publication of the libel. *Gambrill v. Schooley*, 48 Atl. Rep. 730 (Md.). See NOTES, p. 230.

**TRUSTS — PURCHASER FOR VALUE WITHOUT NOTICE. — POWER OF ATTORNEY.** — A trustee gave the plaintiff as security equitable mortgages on certain leaseholds which, unknown to the plaintiff, he held in trust, and in addition gave a power of attorney to three of the plaintiff's clerks to transfer the titles to the leaseholds as the plaintiff should direct. On hearing of the trust, the plaintiff had the titles conveyed to itself. *Held*, that the plaintiff thereby acquired the titles, but held them subject to an equity in favor of the trust estate. *London and County Banking Co. v. Nixon*, [1901] 2 Ch. 231. See NOTES, p. 226.

**WILLS — CHARITABLE TRUSTS — DEVISE TO CORPORATION.** — A will directed that the proceeds of the residue be "held in trust" by an incorporated foreign missionary society, to educate Bible readers and to erect a building for foreign missionary purposes. *Held*, that the money comes to the society, not as a trust, but as a "gift with conditions annexed to its expenditure." *Sherman v. Mitchell*, 48 Atl. Rep. 737 (Md.).

A residue was bequeathed to a camp-meeting association incorporated as auxiliary to the Methodist Church, to be invested, and the income to be applied for educational purposes, with discretion in the association as to the beneficiary. *Held*, that the association takes the residue, not as a trust, but as an absolute gift. *Matter of Griffin*, 167 N. Y. 71.

The legacies in both these cases being for corporate purposes, expressions indicating a trust are held surplusage. Whether or not a devise for general corporate purposes creates a trust is a speculative question; for in either case the state will prevent misappropriation as *ultra vires*. Many authorities find a trust. *The Incorporated Society v. Richards*, 1 Dr. & War. 258, 293; *De Camp v. Dobbins*, 29 N. J. Eq. 36. If



a will specifies certain corporate purposes, diversion of the fund to others is not *ultra vires*, and authorities enforcing these restrictions on the ground of trust are almost countless. *President, etc., of Harvard College v. Society for P. T. E.*, 69 Mass. 280. It is noticeable that if a trust was intended in *Sherman v. Mitchell*, *supra*, it was, by the Maryland rule, void for uncertainty. *Needles v. Martin*, 33 Md. 609. The New York cases which *Matter of Griffin*, *supra*, follows were in like circumstance. *Westmore v. Parker*, 52 N. Y. 450; *Bird v. Merkle*, 144 N. Y. 544. So too the only other case found in accord with the principal cases. *Executors of McDonough v. Murdoch*, 15 How. 367, 380. *Sherman v. Mitchell*, *supra*, annexes a condition to the bequest, presumably in favor of the estate. This, even if legally conceivable, only approximates the testator's intention, for that was, as the court agrees, to exclude his next of kin. The construction as a whole is merely a convenient device to save as a gift a charitable bequest which would fail as a trust. A statute similar to that now in force in New York is a more scientific remedy.

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## REVIEWS.

**THE LIABILITY OF MUNICIPAL CORPORATIONS FOR TORTS.** By Waterman L. Williams. Boston: Little, Brown & Co. 1901. pp. xxxix, 345. 8vo.

The subject of municipal liability for tort, with its somewhat peculiar and special doctrines and its frequent conflicts of authority, presents an especially fruitful field for a text writer, and one in which there has been but little fundamental investigation. Its basic principles involve the underlying theories of government and society. Its application, however, is of great practical importance, especially in view of the growing socialistic tendency of our municipalities to branch out into new classes of public enterprise. In the present volume, Mr. Williams has given us a most excellent handbook and practical treatise upon this latter and every-day side of the subject. He has clearly stated the main principles and graphically applied them to the different classes of cases that arise, so that many of the conflicts are explained, or at least shown to be only the results of difficulties in applying these principles to complicated questions of fact. The whole subject is covered with much thoroughness and detail, with a full citation of cases upon all the different topics. Statutory liability for tort, especially in relation to public highways, is also extensively discussed. The book will thus prove valuable to any practitioner who deals with this branch of the law.

But to the legal student this work is somewhat disappointing. We cannot believe that the topic has reached its final crystallization. Hence a thorough investigation and development of the fundamental principles in the light of new analogies and with new applications would not only prove of great scientific interest, but would be most important in establishing rules of liability upon a clearer and more satisfactory basis. By confining himself less closely to the statement of the law and by giving more attention to this more important phase of the subject, the author would have rendered a much more important service to the profession.

W. H. H.

**THE TESTAMENTARY EXECUTOR IN ENGLAND AND ELSEWHERE.** By R. J. R. Goffin. London: C. J. Clay & Sons. 1901. pp. xii, 136. 8vo.

This essay, which won the Yorke prize in 1899, is a very interesting contribution to the historical study of law. The author shows that testamentary executorship did not exist in Roman law, but was an outgrowth of Germanic institutions, in which it first appeared. Its introduction into England, caused largely, it is probable, through the influence of the church, must have taken place some time after the Norman Conquest, as the word executor first occurs in the work of Glanville. In this, as in other cases, early judicial centralization enabled England to develop the institution to maturity, while, on the Continent, its growth was both retarded and stunted by the existence of numerous crude systems of local law which resulted from the triumph of feudalism as a political system. The work does not trace the history of the executor in England beyond the earlier part of the seventeenth century, when he had finally secured the position of personal representative of the deceased. Though the author, owing to the state of the materials, is often unable to show historical continuity in detail, yet his argument for its existence is convincing, and he is able to make the institutions of different countries and periods throw light upon one another.

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**THE LAW OF SALES.** By Francis M. Burdick, Professor of Law in Columbia University. Second Edition. Boston: Little, Brown & Co. 1901. pp. xli, 299. 8vo.

**CASES ON THE LAW OF SALES.** By Francis M. Burdick. Second Edition. Boston: Little, Brown & Co. 1901. pp. xiii, 792. 8vo.

The principal change in these two books since the first edition is in point of size; the case-book is longer by more than one hundred pages, while the text-book, in octavo instead of duodecimo form, has also an increase of a score of pages. The main body of the former remains unchanged, the additions to it being in the form of a supplement which contains more than forty new cases, for the most part decisions rendered since the first edition appeared; the appendix also contains additional extracts from state statutes and foreign codes. The text-book shows signs of a careful revision; not only has the author brought his work up to date by noting and discussing recent decisions, but frequently the language has been improved, and sections rewritten, to render obscure points more clear. The author cites about two thousand cases, carefully selecting those especially valuable for the student, for whom this treatise is primarily designed.

The arrangement of the two books is identical and remains the same as in the first edition. The text-book makes no pretence at being exhaustive and omits some points usually considered in connection with the subject; but it deals clearly and comprehensively with such essential points of the law as present difficulties to the student. The perplexing matter of conditions and warranties occupies almost a quarter of the book, and while the discussion does not result in absolute clearness, it is on the whole as satisfactory as can be expected in such a hopelessly confused branch of the law. In order to effect a saving of space, the provisions of the Statute of Frauds have not been separately treated, but have been considered incidentally throughout the work. The result is to render

the beginner's path somewhat more confused, but the care and clearness with which the distinctions between the requirements of the statute and of the common law are noted reduces that confusion to a minimum. The text-book, which is practically a volume of notes on the cases, is of course especially valuable to one studying the case-book, and will therefore prove helpful to students reviewing the subject, and to those studying law without the aid of an instructor. More such treatises to accompany case-books would fulfil a distinct want.

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**LAW OF REAL PROPERTY.** By Charles T. Boone. Second Edition. San Francisco: Bancroft-Whitney Co. 1901. 3 vols. pp. xxvii, 612; 632; xiii, 652. 16mo.

This short work in three volumes is an attempt to correlate under appropriate headings the diverse decisions in the law of real property. It cannot well be defined as a digest, nor yet as a treatise. The writer does not attempt to draw any conclusions nor to state any underlying principles. He simply puts forward in a clear and convenient form what the American law is as he understands it. For instance, where decisions on any given point are inconsistent, the writer makes no attempt to say which is the more correct, he simply refers to the decisions, and lets the reader draw his own inferences. For this reason the work is not to be regarded as a text-book containing valuable discussions of much mooted points. The learned in the law of real property would, perhaps, seldom have occasion to refer to it. As a hasty reference manual, however, to important decisions, this little work should be of great service to the modern practising lawyer. It will act as a convenient guide to the authorities, where a text-book would give too personal a view of the law, and where an encyclopedia would prove cumbersome. The value of the book rests largely in its clearness and conciseness. There can be no mistaking what the author means. He is seldom ambiguous, and his exposition of his own interpretation of the questions decided, cleared as it is of obsolete forms or doctrines, is certainly a relief to the seeker of authorities. The work is distinctly modern, both in treatment and in the cases cited, and may be recommended.

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**FALSTAFF AND EQUITY: AN INTERPRETATION.** By Charles E. Phelps. Boston and New York: Houghton, Mifflin & Co. 1901. pp. xvi, 201. 12mo.

There is certainly an art in letting the mind dwell upon a phrase, until it dreams the hidden meaning, especially where the phrase is blind, and the reading public are busy. The above work, by Judge Phelps, is an explanation of Falstaff's remark, "An the Prince and Poins be not two arrant cowards there's no equity stirring." According to the learned author the pregnant phrase, "There's no equity stirring," is "surcharged with a quadruplex meaning," there being one significance "for posterity and for all time," two for the immediate audience, and still another for Shakespeare's family and friends. In order to show this the learned commentator cites cases illustrating the struggle between the law and equity, so stirring it would seem at the time Shakespeare wrote. As the

development of a theme the argument is ingenious and interesting. The style of the work may be suggested by the following lines, "Shakespeare was a poet, but he was a poet who meant business. He made plays for money, and he made them to go," forcible, perhaps, but hardly as delicate as might be expected in connection with such a subtle interpretation.

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PROBATE REPORTS ANNOTATED. By George A. Clement. Vol. V. New York: Baker, Voorhis & Co. 1901. pp. xxxix, 774. 8vo.

It is always to the advantage of a practising lawyer to have at his command recent decisions upon questions with which he has to deal. In view, however, of the great number of cases that are decided each year, it is very difficult to discover such cases as will be of service. It is, of course, comparatively simple to find the case in one jurisdiction, but it is very difficult to keep in touch with decisions by other courts. The book at hand aims to be of service to lawyers who are specially interested in probate business by assisting them in their search for recent cases upon probate law. The editor has chosen such of the recent decisions throughout the country as seem to deal with interesting or important points in the law of wills. He does not purport to give all the cases upon this topic, but only such as seem to deal with questions which it will be to the interest of probate lawyers at large to have at hand.

There is no doubt that such a work, if well done and accompanied by frequent and well-made digests, will be of great value. The usefulness of the present work, however, is greatly diminished by a very faulty index. This is made up of selections from head-notes grouped under very general heads. As there are no subdivisions or catch phrases to help, it is necessary to read each head-note before its bearing is known. That it is of so little assistance in finding whatever of value there is in the text is the more unfortunate as the cases seem well chosen and serviceable.

The editor seems to have another purpose equally meritorious. Many of the cases are followed by extended notes upon the subject involved in the principal case. These notes contain short statements of the status of the law, together with references to the more important cases on the subject. These citations are of great assistance in starting upon a thorough investigation of the subject, and put the lawyer upon the track of much that is important. The notes seem to be uniformly well chosen, and will doubtless be very serviceable to one who has occasion often to deal with probate matters.

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THE COMMEMORATION OF JOHN MARSHALL AT BOSTON AND CAMBRIDGE. By Marquis F. Dickinson. Boston: Little, Brown & Co. 1901. pp. xvii, 120. 8vo.

This book collects and puts into permanent form the addresses made in and about Boston at the recent celebration in honor of John Marshall. It contains the exercises before the Massachusetts Supreme Court, Professor Thayer's address in Cambridge, and the proceedings before the Boston Bar Association. The speeches are all well worth preserving, and the workmanship of the printer, always in good taste, is suitable to

the excellence of the contents. One regrets that the edition of so pleasing a book should be limited to a few copies.

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CYCLOPEDIA OF LAW AND PROCEDURE. Edited by William Mack and Howard P. Nash. Vol. I. A to Affidatus. New York: American Law Book Company. 1901. pp. v, 1160. 4to.

As the editors remark in their preface, "the cyclopedic method of treatment is far from being a new one in the law," — and naturally so, for it tends to produce exceedingly useful books. A single series of volumes may by this method offer an abridgment of the whole law, conveniently arranged, and fortified by full collections of the authorities on every question. Such works, well done, are invaluable to student and practitioner. For reference, they fill the place of a library of text-books. Because of their more elaborate and exact analysis, they are often more useful as indexes of decided cases than the current digests.

The merits of the present work can justly be determined only by actual use. The arrangement is perhaps not unexceptionable. Such topics as "Accomplices" and "Accommodation Paper" are not dealt with under those heads, but under the general titles, "Criminal Law" and "Bills and Notes." There is also a tendency to expand the notes by unnecessarily long statements of the facts of cases cited, as on pages 189, 190. These, however, are largely matters of detail, unimportant if the work as a whole prove satisfactory.

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GENERAL DIGEST, AMERICAN AND ENGLISH. Bi-Monthly Advance Sheets. Rochester: The Lawyers' Coöperative Publishing Co. No. 23. June, 1901. pp. 892. 8vo.

AMERICAN DIGEST. Advance Sheets. St. Paul: West Publishing Co. No. 163. June, 1901. pp. xii, 892. 8vo.

Except for covers and advertising pages these books are absolutely identical. They purport to digest English as well as American cases, and a considerable number of legal periodicals. GENERAL DIGEST, cover page; AMERICAN DIGEST, iii. A cursory examination, however, has disclosed but few cases not found in the West Publishing Company's Reports; and the digesting of legal periodicals is noticeably incomplete.

With the great multiplication of law reports a help in finding one's way among the cases is increasingly necessary. The publications at hand are designed to meet this need in part, by furnishing an index of current case-law. As indexes they appear inadequate in material and in arrangement. They consist mainly of head-notes, or parts of head-notes, copied *verbatim* from the reports and arranged under a fixed number of digest-heads. This use of head-notes swells the digests with useless statements of facts, and renders it unnecessarily difficult to find illustrations of principles. Further, head-notes frequently do not exactly express the questions involved in the cases. Nor is the arrangement of these works well adapted to an index. In an orderly statement of legal principles the number of main divisions is comparatively few. An index of this kind, however, aiming not to state principles but to afford access to scattered cases and discussions, for its different purpose requires a different arrangement. One consults it to find material in the volumes indexed bearing

upon some particular point. He thinks of that point by its special name, and not by the name of that large division of the law under which it may belong in a scientific classification. In an index, therefore, convenience is promoted if every legal principle with a definite and commonly used name has a separate index-head. It follows that the number of heads should be limited only by the variety of the materials indexed. In these digests the collection of many head-notes under general titles results in much confusion.

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**OUTLINES OF THE LAW OF REAL PROPERTY.** By L. W. McCandless.  
Ann Arbor: George Wahr. 1901.

This work consists of analytical tables intended to illustrate the second volume of Blackstone. Starting with property in general, the author makes many divisions and subdivisions, and carries on this process until he has made a complete skeleton of the law of real property. The work is planned on so large a scale that it has been found necessary to divide it into nineteen parts in order that it may be handled with any ease.

It is difficult to give such a book its proper place. Only students who have carefully studied the law of property will find it of service. There is, however, no doubt that in studying so vast a subject as real property, it is very necessary for the student to systematize his work with care and to take a comprehensive view of the whole subject and its different related parts as he proceeds. This is specially true when only a small share of one's time is devoted to this subject, for unless the student has a clear idea of the different divisions of the law and the relations of the different parts, the subject must seem like a mass of ancient learning, difficult to comprehend and still more difficult to remember. If, then, the student tabulates his work for himself, he will find the process of peculiar value, but this value comes more from the work of analyzing than from studying the tables. Those who have too little time or opportunity to do this work for themselves will doubtless derive some assistance from a work like the one in hand, but those who have the opportunity will profit more by doing such work without assistance. As the book goes so much more into details than is usual, and does not try to condense the work by many abbreviations, it will doubtless be of value for a hasty review before examinations.

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**A TABULATED DIGEST OF THE DIVORCE LAWS OF THE UNITED STATES.**  
By Hugo Hirsh. New Edition. New York: Funk Wagnalls Co.  
1901.

This digest purports to afford a concise view of the divorce laws in the different states. It is arranged in the form of a table, upon one large folded sheet, in such a way that, by reading from left to right, any particular cause for divorce may be traced and the law in regard to that cause in each state may be seen, while, by reading down the page, each column tells what the law of divorce in general is in each state. The work seems to be done as carefully as is possible with such conciseness, and it will be of service to one who desires but a brief and general idea of the divorce laws in the different states. A work so arranged, however, will be found awkward and difficult to handle by all who use it.

**AN EPITOME OF LEADING CASES IN EQUITY.** By W. H. Hastings Kelke. London: Sweet and Maxwell, Limited. 1901. pp. xx, 235. 12mo.

This is the fourth of a series of Student's Epitomes, the former volumes of which have already been noticed in the Review. The author's style and system of abbreviations are very unconventional and sometimes troublesome. The present work states very concisely the results of a mass of English decisions and statutes, but as it does not consider American cases, contains practically no discussion of principles, and does not attempt a full citation of authorities, its value will be very small in America, and limited even in England. It is evidently an examination manual, but would not be useful for that purpose in this country.

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**THE BENCH AND BAR AS MAKERS OF THE AMERICAN REPUBLIC.** By W. W. Goodrich. New York: Treat & Co. 1901. pp. 65. 12mo.

This well-made book gives, in a very convenient form, the address delivered by Judge Goodrich, of New York, on Forefathers' Day, 1900. The book is illustrated by pictures of several of the American lawyers who have been prominent in the formation and development of our country, and who have formed the chief subject-matter of the address.

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**WHERE TO LOOK FOR THE LAW.** Fifth Edition, Rochester: The Lawyers' Coöperative Publishing Co. 1901. pp. 101.

**A TREATISE ON THE PROCEDURE IN SUITS IN EQUITY IN THE CIRCUIT COURTS OF THE UNITED STATES.** By C. L. Bates. Chicago: T. H. Flood & Co. 1901. 2 vols. pp. lxii, 599, 810. 8vo.

**THE LAW OF AGENCY.** By Ernest W. Huffcut, Professor of Law in the Cornell University. Second Edition. Boston: Little, Brown & Co. 1901. pp. li, 406. 8vo.

**THE PUBLICATIONS OF THE SELDEN SOCIETY. SELECT PLEAS OF THE FOREST.** Edited by G. J. Turner. London: Bernard Quaritch. 1901. pp. cxxxix, 192. 4to.

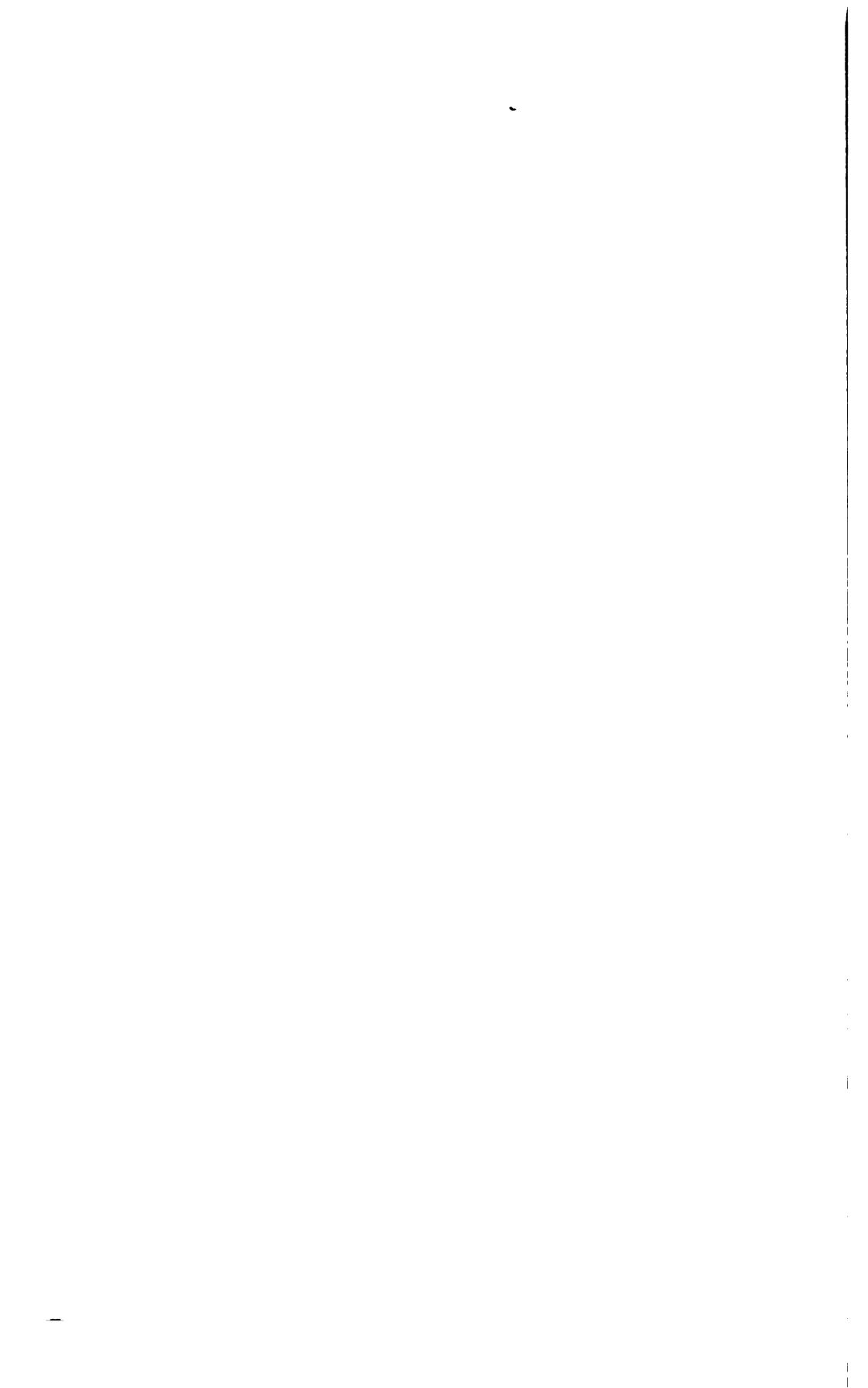
**REAL AND PERSONAL PROPERTY UNDER QUEEN VICTORIA.** By J. E. R. De Villiers. London: C. J. Clay and Sons. 1901. pp. xix, 236. 12mo.

**COMMENTARIES ON THE LAW OF NEGLIGENCE.** By Seymour D. Thompson. Indianapolis: The Bowen-Merrill Co. 1901. 6 vols. Vols. 1 and 2. pp. lvii, 1254; li, 1134. 8vo.

**THE LAW OF CONTRACTS.** By Edward Avery Harriman. Second Edition. Boston: Little, Brown & Co. 1901. pp. liv, 410. 8vo.

**HANDBOOK OF EQUITY JURISPRUDENCE.** By James W. Eaton. St. Paul: West Publishing Co. 1901. pp. xviii, 734. 8vo.

**HANDBOOK OF ADMIRALTY LAW.** By Robert M. Hughes. St. Paul: West Publishing Co. 1901. pp. xvii, 503. 8vo.





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## PUBLIC SERVICE COMPANY RATES AND THE FOURTEENTH AMENDMENT.

IN view of the number and importance of the cases in which the protection of the Fourteenth Amendment to the United States Constitution is invoked in the Federal Courts by corporations under the constantly increasing pressure of state regulation of rates, of the doubts still entertained as to the consistency of the Supreme Court in its decisions on this subject,<sup>1</sup> and of the uncertainty as to where the line will ultimately be drawn between permissible and invalid interference of this sort with the rights incident to property, it is thought that an article like the one now proposed may be not unacceptable.

It is the purpose of the article to state as briefly as possible the result of the adjudications of the Federal Courts defining the right of the States to regulate the rates or prices to be charged by so-called public service corporations for their services or commodities, the limitations of that right imposed by the Fourteenth Amendment to the United States Constitution, the nature of the remedies available where the constitutional limitations have been or are about to be violated by the officials of any State, and the special limitations imposed by the Eleventh Amendment to the United States Constitution upon the original jurisdiction in equity of the Circuit Courts of the United States in such cases.

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<sup>1</sup> See, for instance, a recently published work by Alfred Russell, Esq., on the *Police Powers of the State*, chap. vii. Chicago, 1900.

One or two minor and collateral points will also be considered, and reference will be made to certain decisions of state courts which serve to illustrate or explain some of the principles upon which the Federal Courts appear to have proceeded.

We shall also endeavor to indicate some of the unsettled questions involved in the matters enumerated above.

## I.

## THE RIGHT OF THE STATE TO FIX RATES.

Notwithstanding the hesitation exhibited by some of the justices of the United States Supreme Court in a few of the earlier cases, and the doubt expressed as late as 1891 whether *Munn v. Illinois*,<sup>1</sup> was still law,<sup>2</sup> the actual decisions of that Court are not inconsistent with each other; and they establish an intelligible rule of law with certain plain limits or exceptions.

*The general rule is that the several State legislatures have the power to regulate the rates or prices charged for the services rendered or commodities sold by persons or corporations engaged in a business affected with a public interest or use.*

This doctrine, though previously asserted by State courts in several jurisdictions, as in *Parker v. Metropolitan R. R. Co.*,<sup>3</sup> was first announced and elaborated by the United States Supreme Court in *Munn v. Illinois*.<sup>4</sup> The subsequent decisions of that Court on this point will be discussed hereafter.

The power of regulation extends to individuals as well as to corporations,<sup>5</sup> and is not dependent upon the existence or non-existence of a charter, grant, or franchise from the Legislature, or upon the reservation of a power of alteration or repeal, but rests upon the police power of the States.<sup>6</sup>

It may be exercised by the people of a State directly through

<sup>1</sup> 94 U. S. 113.

<sup>2</sup> See *Chicago, Milwaukee & St. Paul R. R. v. Minnesota*, 134 U. S. 418, in which three judges dissented on the ground that the majority were overruling *Munn v. Illinois*; and *Budd v. New York*, 143 U. S. 517, where three judges dissented on the ground that the majority were reviving *Munn v. Illinois*.

<sup>3</sup> 109 Mass. 506 (1872).

<sup>4</sup> 94 U. S. 113 (1876).

<sup>5</sup> *Munn v. Illinois*, 94 U. S. 113; *Budd v. N. Y.*, 143 U. S. 517; *Brass v. Stoeser*, 153 U. S. 391.

<sup>6</sup> *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Wabash, St. L. & P. R. R. v. Illinois*, 118 U. S. 557, 569; *Covington Turnpike Co. v. Sanford*, 164 U. S. 578; *Brass v. Stoeser*, 153 U. S. 391; *Lake Shore & M. S. Ry. v. Smith*, 173 U. S. 684. But see *Russell's Police Powers of the State*, p. 108.

an act of its Legislature;<sup>1</sup> or through commissioners, county or municipal authorities, or other officers or agents acting under the provisions of a State constitution or statute.<sup>2</sup>

However exercised, it is always a legislative, and not a judicial function; and, if delegated by a State constitution or Legislature to State officers, the latter, whether designated a "board," "commission," "council," or even "court," are still agents of the State, exercising functions which are in their nature legislative, administrative, or political, and never judicial.<sup>3</sup> The suggestion by Chief Justice Waite in the earlier cases that the duties of such a tribunal are judicial in their nature has been superseded by the doctrine just stated. In *Janvrin*, Petitioner,<sup>4</sup> however, the Supreme Judicial Court of Massachusetts, in a majority opinion and with some hesitation, sustained a statute giving to actual water-takers within a certain district, part of which was supplied by the respondent water company, the right to apply to that court, or two or more justices thereof, when aggrieved by a rate charged or about to be charged, to determine the reasonableness of the rate. The

<sup>1</sup> The *Granger* cases, 94 U. S. 113 *et seq.*; *Ruggles v. Illinois*, 108 U. S. 526; *Dow v. Beidelman*, 125 U. S. 680; *Chicago & G. T. R. R. v. Wellman*, 143 U. S. 339; *Budd v. New York*, 143 U. S. 517; *Brass v. Stoesser*, 153 U. S. 391; *St. Louis & S. F. R. R. v. Gill*, 156 U. S. 649; *Covington Co. v. Sanford*, 164 U. S. 578; *Smyth v. Ames*, 169 U. S. 466; 171 U. S. 361; *Fitz v. McGhee*, 172 U. S. 516; *Lake Shore & M. S. R. R. v. Smith*, 173 U. S. 684; *Cotting v. Kansas City Stock Yards*, 79 Fed. Rep. 679.

<sup>2</sup> *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Chicago, M. & St. P. R. R. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *San Diego Land Co. v. National City*, 174 U. S. 739; *Chicago, M. & St. P. R. R. v. Tomkins*, 176 U. S. 167; *Freeport Water Co. v. Freeport*, 180 U. S. 587; *Tilley v. Savannah R. R.*, 5 Fed. Rep. 641; *Chicago & N. W. R. R. v. Dey*, 35 Fed. Rep. 866; *Chicago, St. P., M. & O. R. R. v. Becker*, 35 Fed. Rep. 883; *Cleveland Gas Co. v. Cleveland*, 71 Fed. Rep. 610; *Capital City Gas Co. v. Des Moines*, 72 Fed. Rep. 818 and 829; *Milwaukee Ry. Co. v. Milwaukee*, 87 Fed. Rep. 577; *San Diego Land Co. v. Jasper*, 89 Fed. Rep. 274; *San Joaquin Irrig. Co. v. Stanislaus County*, 90 Fed. Rep. 516; *Wilmington & W. R. Co. v. Commissioners*, 90 Fed. Rep. 33; *Northern Pac. R. R. v. Keyes*, 91 Fed. Rep. 47; *Cleveland City Ry. Co. v. Cleveland*, 94 Fed. Rep. 385; *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *Kimball v. Cedar Rapids*, 99 Fed. Rep. 130; *Louisville & N. R. R. v. M'Chord*, 103 Fed. Rep. 216; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1; *Haverhill Gaslight Co. v. Barker*, 109 Fed. Rep. 694.

<sup>3</sup> *Chicago & G. T. R. R. v. Wellman*, 143 U. S. 339, 344; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 394, 397; *Interstate Com. Com. v. Ry. Co.*, 167 U. S. 479, 499; *Interstate Com. Com. v. Brimson*, 154 U. S. 447, 474, 489; *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 663; *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335; *State v. Johnson*, 61 Kan. 803; *Nebraska Tel. Co. v. State*, 55 Neb. 627; *Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 576.

<sup>4</sup> 174 Mass. 514, 517.

statute was attacked on the ground that it was an attempt to impose legislative functions upon the judiciary. It was sustained on the ground stated by Mr. Chief Justice Holmes that "it does not undertake merely to make of the Court a commission to determine what rule shall govern people who are not yet in relation to each other, and who may elect to enter or not to enter into relations as they may or may not like the rule which we lay down; it calls on us to fix the extent of actually existing rights. With regard to such rights judicial determinations are not confined to the past. If it legitimately might be left to this Court to decide whether a bill for water furnished was reasonable, and, if not, to cut it down to a reasonable sum, it equally may be left to the Court to enjoin a company from charging more than a reasonable sum in the immediate future." It may safely be said of the statute under consideration in that case that it went to the extreme permissible limit in extending the functions of the judiciary.<sup>1</sup>

A Kansas statute creating a "Court of Visitation" with power both to fix rates and to pass judicially and finally upon them was held unconstitutional by the State court as violating the provision of the State constitution for the separation of the legislative and judicial branches of the State government.<sup>2</sup>

The fixing of rates, being, like any other exercise of the police power, a legislative function, whether done by the people in a State constitution, by their representatives in a State legislature, or by their agents upon subordinate boards, councils, or commissions, is always regarded as the act of the State itself. A rate commission, says Mr. Justice Brewer, in *Reagan v. Farmers' Loan & Trust Co.*,<sup>3</sup> is "merely an administrative board created by the State for carrying into effect the will of the State as expressed by the Legislature."

"The prohibitions of the Fourteenth Amendment," says Mr. Justice Harlan, in *Ex Parte Virginia*,<sup>4</sup> "have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its Legislature, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State or of the officers or agents by

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<sup>1</sup> See also *Brymer v. Butler Water Co.*, 179 Pa. 231.

<sup>2</sup> *State v. Johnson*, 61 Kans. 803.

<sup>3</sup> 154 U. S. 362, at p. 394.

<sup>4</sup> 100 U. S. 339, 346.

whom its powers are exerted shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies, or takes away the equal protection of the laws, violates the constitutional inhibition ; and, as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning."

The following are the only kinds of property or business that have been actually held by the United States Supreme Court to be so affected with a public interest as to be subject to the State regulation of rates : namely, railroads, water supply, toll bridges, turnpikes, and grain elevators ; but it has also been held in the Circuit Courts that the business of gas, electric light, telegraph, stockyard and street railway companies is affected with a public interest within the rule under consideration, and that the prices charged are, therefore, subject to statutory regulation.<sup>1</sup> In the State Courts ferries, grist mills and telephone companies have also been held to be subject to this power of the legislature.<sup>2</sup>

It would seem as unprofitable to attempt any general definition of what constitutes that "public interest" or "public use" which renders the business and property to which it attaches subject to state regulation of rates and prices as it is to attempt a definition of the "police power" itself. Attempts of the latter kind have been discouraged by the Supreme Court of the United States in several well known passages in its opinions.<sup>3</sup> Certain broad elements of similarity in the subject-matter of the adjudicated cases, suggested by the expression "public service companies" now coming into common use, will in some cases serve as a sufficient criterion.

So far as the actual decisions go the right of regulation of rates has not been carried beyond two classes of cases. In the cases of the first class the right is sustained partly because the business is one of a class that has for a long time been subjected to such regulations and partly because it serves the public necessities or in a high degree the public convenience, and the opportunity to pursue it naturally and generally involves some features of a monopoly. Such are the grain elevator, stockyard, and grist mill cases. In the other class of cases the right of regulation may depend on the

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<sup>1</sup> 71 Fed. Rep. 610; 72 ib. 818, 829, 952; 82 ib. 245; 109 ib. 694, and cases *supra*. As to wharfage, see 121 U. S. 444.

<sup>2</sup> 109 Mass. 506; 55 Neb. 627; 86 Me. 102.

<sup>3</sup> 16 Wall. 36, 62; 101 U. S. 814, 818; 115 U. S. 650.

possession by the person or corporation interested of special franchises, such as the power of eminent domain or rights in the public streets; at least this would seem to be a sufficient foundation for legislative regulation of the rates charged by water, gas, electric light, telephone, telegraph, street railway, bridge, turnpike and railroad companies.

It must be confessed, however, that this subject is attended with difficulties, many of which may be insoluble by resort to any general principles, but which may be expected to find a gradual solution by the process of "judicial exclusion and inclusion" applied to the facts of particular cases in the light of existing social and economic conditions. Take, for instance, the business of manufacturing gas or electricity and selling it to distributing companies, unaccompanied by any special franchises. Is it permissible for the State in the exercise of the police power or of any other power to fix the maximum price to be charged for gas and electricity manufactured and sold under such conditions? In connection with this and other doubtful cases it must always be remembered that the circumstances and conditions rendering permissible so strong an exercise of the police power as the regulation of rates and prices are not the same as the circumstances and conditions that might justify some other exercise of that power like the regulation of the times, places, or manner in which the business may be carried on.<sup>1</sup>

## II.

### THE CONSTITUTIONAL LIMITATION OF THE RIGHT OF THE STATE TO REGULATE RATES.

*A. If the rates fixed by a State are unreasonably low, they are obnoxious to the provisions of the Fourteenth Amendment.*

Having stated the general rule, it remains to state the equally well-settled qualification or limitation,<sup>2</sup> that where a State law or the order of a State commission or other agency fixes rates or prices so low as not to permit the company to earn its operating

<sup>1</sup> Lake Shore M. & S. R. R. v. Smith, 173 U. S. 684, 691.

<sup>2</sup> Other limitations, namely, that the power of regulating rates cannot be so exercised as to interfere with interstate commerce (see 114 U. S. 196; 116 U. S. 307, 325; 118 U. S. 557; 154 U. S. 206), or in such a manner as to impair vested contract rights (see 94 U. S. 155, 161; 108 U. S. 526, 531, 537; 110 U. S. 347, 353; 116 U. S. 307, 325; 128 U. S. 174, 179; 134 U. S. 418, 454; 156 U. S. 649; 169 U. S. 466, 523; 173 U. S. 684, 687; and Cleveland City Ry. Co. v. Cleveland, 94 Fed. Rep. 385), are outside the scope of this article.

expenses properly estimated and a reasonable profit upon the capital actually invested in its plant, such statute or order is the subject of judicial review, and must be declared void, and its enforcement enjoined, as a violation of those provisions of the Fourteenth Amendment to the United States Constitution forbidding any State to deprive any person of his property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws.

This proposition has for many years been the established law of the United States courts, as will appear from the following review of the cases.

#### DECISIONS OF THE U. S. SUPREME COURT.

*Munn v. Illinois*,<sup>1</sup> which was the first case in which the State regulation of rates was brought before the United States Supreme Court, contains a dictum by Chief Justice Waite to the effect that the reasonableness of such rates is a matter for the sole determination of the State Legislature, and is not the subject of judicial inquiry or review. It is to be observed, however, that in that case the question was not squarely presented whether the rate fixed by the Legislature was so low as to amount to a deprivation of property within the meaning of the Fourteenth Amendment, because that issue was not raised at the trial,<sup>2</sup> and the indictment was not only for charging more than the statutory rate, but also for doing business without procuring the license required by the statute.

In the cases in 94 U. S. 155, 164, 179, 180, 181, the general principles laid down in *Munn v. Illinois* for the business of grain elevators were applied to the transportation by rail of freight. In those cases, also, it was not alleged that the rates were so low as to amount to a deprivation of property without due process of law; but the Chief Justice took occasion to repeat his dictum in *Munn v. Illinois*, above referred to.

In *Shields v. Ohio*,<sup>3</sup> *Ruggles v. Illinois*,<sup>4</sup> *Illinois Central R. R. Co. v. Illinois*,<sup>5</sup> the same general principles were applied to the

<sup>1</sup> 94 U. S. 113.

<sup>2</sup> The unreasonableness of the rate must be distinctly raised; in civil cases, including actions for penalties, by the pleadings — *Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339; *St. Louis & S. F. R. R. Co. v. Gill*, 156 U. S. 649; *Lake Shore & M. S. Ry. Co. v. Smith*, 173 U. S. 684; *Beardsley v. Erie R. R.*, 44 N. Y. Supp. 175; and in a criminal case at the trial — *Ruggles v. Illinois*, 108 U. S. 526; *Budd v. New York*, 143 U. S. 517.

<sup>3</sup> 95 U. S. 319.

<sup>5</sup> 108 U. S. 541.

<sup>4</sup> 108 U. S. 526.

transportation of passengers by rail; but there was no evidence in any of them that the rates were unreasonable.

Up to this time (1883) there had been no qualification of Chief Justice Waite's dictum in *Munn v. Illinois*; and we accordingly find Judge Woods, of the Circuit Court for the Southern District of Georgia, deciding in *Tilley v. Savannah R. R. Co.*,<sup>1</sup> that there could be no judicial review of the reasonableness of rates fixed by a State commission, at least until they had been put in operation.<sup>2</sup>

Then came *Spring Valley Water Works v. Schottler*,<sup>3</sup> in which a State constitution and a statute based thereon requiring certain municipal authorities to fix the rates of water companies was upheld. No rates had in fact been fixed, so that the question of their reasonableness could not and did not arise.<sup>4</sup> In this case, however, Chief Justice Waite took occasion for the first time to qualify his dictum in *Munn v. Illinois* as to the conclusiveness of legislative rates, saying:—

"What may be done if the municipal authorities . . . fix upon a price which is manifestly unreasonable need not now be considered, for that proposition is not presented by this record."

In the Railroad Commission cases,<sup>5</sup> it was held that a bill to enjoin a State railroad commission from fixing maximum rates could not be maintained. In those cases also no rates had been fixed, and therefore the question of their reasonableness was not presented; and the Chief Justice, as may be seen by reference to his opinion,<sup>6</sup> qualifies still further his dictum in *Munn v. Illinois* as to the conclusiveness of State rates.

In *Dow v. Beidelman*,<sup>7</sup> an action by a passenger against the trustees of a railroad for exacting more than the statutory fare was sustained. In this case the reasonableness of the statutory rates was attacked, but it was held that the evidence was not sufficient for the determination of that question. Mr. Justice Gray, speak-

<sup>1</sup> 5 Fed. Rep. 641 (1881).

<sup>2</sup> See also *Ex parte Koehler*, 23 Fed. Rep. 529.

<sup>3</sup> 110 U. S. 347, 354.

<sup>4</sup> The exercise of the power of regulation being obnoxious to the constitution only in the event that, as applied to some particular case, it is so unreasonable as to amount to a confiscation or deprivation of property, it follows that the courts have no jurisdiction to restrain commissioners from adopting rates. The function of the courts is limited to a power of review after the rates are adopted. *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *The R. R. Commission cases*, 116 U. S. 307; *Georgia R. R. & Banking Co. v. Smith*, 128 U. S. 174.

<sup>5</sup> 116 U. S. 307, 347, and 352.

<sup>6</sup> p. 335.

<sup>7</sup> 125 U. S. 680, 690, 691.



ing for the Court, intimates that there might be evidence which would require the Court to declare such a schedule of rates void under the Fourteenth Amendment.

We thus have in *Spring Valley Water Works v. Schottler*, the Railroad Commission cases, *Dow v. Beidelman*, the last-named case decided in 1888, intimations by a majority of the Supreme Court, including Chief Justice Waite, that the assertion by the latter in *Munn v. Illinois* of the supreme power of a State legislature over public service company rates was not to be considered as law.

In the mean time, in 1888, Judge Brewer in the Circuit Court held that a bill in equity could be maintained in the Federal courts by a railroad company to restrain the enforcement of rates established by a State commission, which were alleged to be so low as to deprive the company of all (net) compensation for the use of its property.<sup>1</sup>

Passing *Georgia R. R. and Banking Co. v. Smith*,<sup>2</sup> which went off on other points, the next important case was *Chicago, M. & St. P. R. R. v. Minnesota*,<sup>3</sup> in which a judgment of the Supreme Court of Minnesota, ordering the issue of a writ of mandamus to compel the railroad company to comply with the rates fixed by a State commission, was reversed on writ of error, and the case remanded for the taking of testimony as to the reasonableness of the tariff established by the commission.

The case of *Minneapolis Eastern R. R. v. Minnesota*<sup>4</sup> was decided at the same time upon the same ground. In *Chicago & G. T. R. R. v. Wellman*,<sup>5</sup> in which the Court refused to hold a State statute fixing passenger rates unconstitutional, on the ground that the evidence of earnings was too slight and inconclusive to justify any ruling on that subject. *Budd v. New York*<sup>6</sup> and *Brass v. Stoeser*<sup>7</sup> went off on the same ground; namely, the insufficiency of the evidence. In the *Budd* case, however, Mr. Justice Blatchford, *obiter*, attempts to distinguish rates fixed directly by the Legislature from rates fixed by a commission,<sup>8</sup> — a distinction which was rejected in the *Reagan* and subsequent cases.

Then came the cases which may be regarded as having finally settled the law on this subject; namely, the *Texas Railroad*, or

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<sup>1</sup> *Chicago & N. W. R. R. v. Dey*, 35 Fed. Rep. 866; *Chicago, St. P., M. & O. R. R. v. Becker*, 35 Fed. Rep. 883.

<sup>2</sup> 128 U. S. 174.

<sup>3</sup> 134 U. S. 418.

<sup>4</sup> *Ib.* 467.

<sup>5</sup> 143 U. S. 339.

<sup>6</sup> *Ib.* 517.

<sup>7</sup> 153 U. S. 391.

<sup>8</sup> As in 134 U. S. 418.

"Reagan," cases, decided in 1894.<sup>1</sup> These were bills in equity in the Circuit Court against the Railroad Commission and the Attorney-general of the State of Texas to enjoin the enforcement of rates established by the Commission. Upon demurrer the bills were sustained. The opinion was by Mr. Justice Brewer, whose decisions as Circuit Judge in *Chicago & N. W. R. R. v. Dey*,<sup>2</sup> *Chicago, St. P., M. & O. R. R. v. Becker*,<sup>3</sup> *Ames v. Union Pac. R. R.*,<sup>4</sup> had already done much to clarify this branch of constitutional law. *St. Louis & S. F. R. R. v. Gill*<sup>5</sup> went off on the insufficiency of the evidence. *Covington Turnpike Co. v. Sanford*<sup>6</sup> decides that rates which will not permit the maintenance of the efficiency of the plant, the meeting of ordinary expenses of operation, or the payment of any dividend, are void.

The Nebraska case, *Smyth v. Ames*,<sup>7</sup> is probably now the leading case upon the subject. In it the Court confirms the principle of the Reagan cases, and applies it to a bill in equity to restrain the enforcement of a rate fixed by the Legislature, the Attorney-general and other State officers being enjoined from enforcing the statute by legal process of any sort. *Fitz v. McGhee*,<sup>8</sup> in which a bill in equity brought against the Attorney-general of a State to restrain him from enforcing by criminal prosecutions or otherwise a statutory rate, was dismissed on the ground that that officer was not charged by any State law with any special duty with reference to the enforcement of the statute, will be considered in a subsequent part of this article.

In *San Diego Land Co. v. National City*,<sup>9</sup> which was a bill to enjoin the enforcement of a schedule of water rates fixed by a municipality, although the relief was denied upon the facts of the case, the principle of the Reagan cases was elaborately discussed and reaffirmed by the Court.

The latest decision of the United States Supreme Court is *Chicago, M. & St. P. R. R. v. Tomkins*,<sup>10</sup> in which a bill in equity, filed in the Circuit Court of the United States to restrain the enforcement of a schedule of railroad rates adopted by the South Dakota Railroad Commission, was sustained and the judgment of the

<sup>1</sup> *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413; *Reagan v. Mercantile Trust Co.*, 154 U. S. 418; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 420.

<sup>2</sup> 35 Fed. Rep. 866.

<sup>3</sup> *Ib.* 883.

<sup>4</sup> 64 Fed. Rep. 165.

<sup>5</sup> 156 U. S. 649.

<sup>6</sup> 164 U. S. 578.

<sup>7</sup> 64 Fed. Rep. 165 (as *Ames v. Union Pac. R. R.*); 169 U. S. 466; and 171 U. S. 361.

<sup>8</sup> 172 U. S. 516.

<sup>9</sup> 174 U. S. 739.

<sup>10</sup> 176 U. S. 167.

Circuit Court dismissing the same reversed. The principles announced are the same as in the Reagan and Nebraska cases.

#### DECISIONS OF THE LOWER FEDERAL COURTS.

It is not deemed necessary to present with great detail the numerous decisions of the inferior Federal courts on the precise proposition now under consideration. The subject has long since passed beyond the elementary stage; and the various Circuit courts of the United States are now mainly occupied with the questions of detail which arise in applying the general rule to peculiar situations.

Some of the Circuit Court cases have been already referred to. Among the others are *Cleveland Gas Co. v. Cleveland*<sup>1</sup> and *Capital City Gas Co. v. Des Moines*.<sup>2</sup> In both these cases demurrers to bills in equity brought by gas companies to restrain the enforcement of alleged unreasonable rates for gas fixed by municipal authorities, acting under the laws of Ohio and Iowa respectively, were overruled. In *Capital City Gas Co. v. Des Moines*,<sup>3</sup> Judge Woolson, while refusing upon the facts shown to grant a temporary injunction, reasserts the general principles laid down by him in deciding the demurrer in the same case.<sup>4</sup>

*Cotting v. Kansas City Stock Yards*<sup>5</sup> was a bill in equity to restrain the Attorney-general of Kansas from beginning proceedings to enforce a State law fixing stockyard charges, and making any violation of the act a misdemeanor; and a motion to dismiss, filed by the Attorney-general and others, was denied.

*San Diego Land Co. v. Jasper*<sup>6</sup> and *San Joaquin Irrig. Co. v. Stanislaus County*<sup>7</sup> were both bills in equity to restrain the enforcement of water rates fixed by county or municipal authorities in California under the laws and constitution of that State; and demurrers to the bills were in both cases overruled.

In *Wilmington R. R. v. Commissioners*,<sup>8</sup> a bill in equity against the Attorney-general of a State and others to prevent the enforcement of rates fixed by a State railroad commission was sustained upon exceptions to the bill.

In *Northern Pacific R. R. v. Keyes*,<sup>9</sup> a final decree was issued on a bill to restrain the enforcement of rates established by a State commission.

<sup>1</sup> 71 Fed. Rep. 610.

<sup>4</sup> *Ib.* 818.

<sup>7</sup> 90 Fed. Rep. 516.

<sup>2</sup> 72 Fed. Rep. 818.

<sup>5</sup> 79 Fed. Rep. 679.

<sup>8</sup> *Ib.* 33.

<sup>3</sup> *Ib.* 829.

<sup>6</sup> 89 Fed. Rep. 274.

<sup>9</sup> 91 Fed. Rep. 47.

In *Cleveland City Ry. Co. v. Cleveland*,<sup>1</sup> the enforcement of a municipal ordinance regulating street railway fares was enjoined.

In *Western Union Tel. Co. v. Myatt*,<sup>2</sup> a temporary injunction was granted on a bill to restrain the State Solicitor of Kansas from enforcing the rates established by the so-called "Court of Visitation," and the members of the so-called "Court" were also enjoined.<sup>3</sup>

There has been no serious dissent in the Federal courts during the past twenty years from the proposition that State rates, whether imposed by an act of the Legislature or by the order of a State commission or other agents, must be sufficient to cover the expenses of operation properly reckoned and a reasonable profit on the capital invested, or they are obnoxious to the provisions of the Fourteenth Amendment.

#### DECISIONS OF THE STATE COURTS.

There are also decisions in the State courts to the effect that a State legislature cannot reduce rates below the point of reasonable profit without violating the Fourteenth Amendment; but the State cases are not numerous, as litigation of this character is now generally carried on by means of original bills in the Circuit courts of the United States.<sup>4</sup>

In *Janvrin et al.*, Petitioners,<sup>5</sup> the Court says:—

"The Legislature may fix what the rates shall be, subject only to judicial inquiry whether they are so unreasonably low as to deprive the Company of its property without due compensation. . . . The cases establish the power of the Legislature to fix rates, subject to the qualification that they shall not be unreasonably low."

<sup>1</sup> 94 Fed. Rep. 385.

<sup>2</sup> 98 Fed. Rep. 335.

<sup>3</sup> See, also, the following cases, in which the jurisdiction of the Court to enjoin the enforcement of unreasonable rates has been upheld: *Milwaukee El. Ry., etc., Co. v. Milwaukee*, 87 Fed. Rep. 577; *Kimball v. Cedar Rapids*, 99 Fed. Rep. 130; *Louisville & Nashville R. R. v. M'Chord*, 103 Fed. Rep. 216; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1; *Haverhill Gas Light Co. v. Barker et al.*, 109 Fed. Rep. 694. Where a preliminary injunction is granted, the complainant is usually required to file a bond.

<sup>4</sup> See *Spring Valley Water Co. v. San Francisco*, 82 Cal. 286; *San Diego Water Co. v. San Diego*, 118 Cal. 556; *Winchester Turnpike Co. v. Croxton*, 98 Ky. 739; *State v. Sioux City, etc., R. R.*, 46 Neb. 682; *Janvrin et al., Petitioners*, 174 Mass. 514.

<sup>5</sup> 174 Mass. 514.

## COROLLARIES FROM PROPOSITION II A.

Certain general conclusions must necessarily follow from the power of a State to fix rates, subject to a right of review in the courts to ascertain whether the rates thus fixed are so low as to amount to a deprivation of property.

1. The fixing of rates, whether by a State Legislature or its agents, being a legislative or administrative, and not a judicial act, the courts, in reviewing a State rate, do not undertake to fix the rate itself or to say what rate would not be obnoxious to the Fourteenth Amendment; but simply inquire whether the rate fixed is, under all the circumstances of the case, so low as virtually to deprive the company of its property.

"The Courts do not determine whether one rate is preferable to another or what would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work." — Mr. Justice Brewer, in *Reagan v. Farmers' Loan & Trust Co.*<sup>1</sup>

"The Court has no power to fix rates. It may not declare what rates would be reasonable, and by its decree establish those rates as the rates to be charged. Its power is exhausted on this point when it has duly passed on the reasonableness of the rates as fixed in the ordinance." — *Per Cur.* in *Capital City Gas Light Co. v. Des Moines.*<sup>2</sup>

2. The fixing of rates, whether by a State legislature or its agents, being the act of the State itself, it matters not that the agents have not properly exercised their powers.

Their act is the act of the State; and if, being authorized (expressly or by construction) to establish only reasonable rates, so that in establishing unreasonable rates they are in a sense acting *ultra vires* of their statutory authority, yet their action in establishing rates which are unreasonable is held to be the action of the State. And, if such action operates as a deprivation of property, it is held to be a deprivation by the State within the meaning of the Fourteenth Amendment.

The same principle holds as to laws of a State alleged to violate the contract clause of the United States Constitution. Thus an ordinance of a city council purporting to have been passed under legislative authority is a State "law," irrespective of its validity. Such ordinances, says the Court, in *Penn Mutual Life Ins. Co. v.*

<sup>1</sup> 154 U. S. 362, 397. See also *Osborne v. San Diego Water Co.*, 178 U. S. 22.

<sup>2</sup> 72 Fed. Rep. 818. And see *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502.

Austin,<sup>1</sup> are "but the exercise by the city of a legislative power which it assumed had been delegated to it by the State, and were therefore in legal intendment the equivalent of laws enacted by the State itself."<sup>2</sup>

3. The fixing of rates, even by a State commission, being in legal contemplation, no matter what the designation or powers of the commission, an administrative, legislative, or political act of the State itself, it further follows that the citizen who has been or will be deprived of his property through the operation of the rates thus fixed does not lose his right to a review by the courts simply because he may have been given full opportunity to present his case to the commissioners before action on their part.

The reasonableness of the rates — that is, the question whether they conflict with the Fourteenth Amendment — is a question of *law*, which the citizen is entitled to litigate in the courts of law.<sup>3</sup> This has been the uniform rule adopted by the United States courts; and the intimation to the contrary in *Minneapolis Eastern Ry. Co. v. Minnesota*,<sup>4</sup> has never been followed; although, if no opportunity to be heard is given before the rates are fixed, that might of itself be an independent and sufficient reason to set them aside.

4. Depreciation — that is to say, the amount in excess of the annual expenditures for repairs, which in a properly managed enterprise must be annually applied or set aside to provide for the final renewal of the several parts of the plant — is a proper charge upon income.

Whether or not it is to be regarded as "operating expense" is rather a question of book-keeping than of law; but, in any event, a proper annual allowance for depreciation must be taken into account in determining the validity of an order fixing rates.<sup>5</sup>

<sup>1</sup> 168 U. S. 685.

<sup>2</sup> See, also, *City Railway Co. v. Citizens' Co.*, 166 U. S. 557; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Illinois Central R. R. v. Chicago*, 176 U. S. 646; *Anoka Water Co. v. Anoka*, 109 Fed. Rep. 580.

<sup>3</sup> See *Chicago, M. & St. P. R. R. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *San Diego Land Co. v. Jasper*, 89 Fed. Rep. 274; *Louisville & N. R. R. v. M'Chord*, 103 Fed. Rep. 216, in which, notwithstanding that the complainant had had full opportunity to be heard before the commission, the rates fixed by the latter were declared void by the Court.

<sup>4</sup> 134 U. S. 467, 482.

<sup>5</sup> The Board of Gas and Electric Light Commissioners of Massachusetts has recently advised or prescribed the entering of an allowance for depreciation as a separate item in the annual accounts rendered to it by the companies under its supervision. It is believed that the general practice of such companies throughout the country has heretofore been to enter such items in the operating expense account.

"Compensation," says Judge Brewer in *Chicago & N. W. R. R. v. Dey*,<sup>1</sup> "implies, . . . cost of service," and that "implies . . . keeping the road-bed and the cars and machinery and other appliances in perfect order and repair."

In *So. Pacific R. R. v. Commissioners*,<sup>2</sup> Judge McKenna, in granting a continuance of a temporary injunction against the enforcement of rates established by a State commission, held that, in ascertaining the cost of operating a railroad in reference to the reasonableness of rates, the expenses of operation are not to be strictly limited to the cost of running trains, excluding all betterments, but the cost of reasonable renewals and improvements of road-bed, track, and equipment, must be included.

In *Cotting v. Kansas City Stock Yards*,<sup>3</sup> Judge Thayer says:—

"At the same time, as buildings, pens, pavements, and other similar structures deteriorate in value somewhat from year to year, even where they are repaired in the ordinary way, it is eminently proper, in estimating any profits, to set aside annually out of the gross income a certain sum to cover such depreciation."

And Mr. Justice Brewer, in *Reagan v. Farmers' Loan & Trust Co.*,<sup>4</sup> in stating the opinion of the Court that such expenditures should be considered as proper to be paid from income, says:—

"In the operation of every road there is a constant wearing out of the rails and a constant necessity for replacing old with new. The purchase of these rails may be called permanent improvements or by any other name. But they are what is necessary for keeping the road in a serviceable condition."

"The annual depreciation of the plant," as distinguished from cost of operation, is enumerated by the court in *San Diego Land Co. v. National City*,<sup>5</sup> as one of the matters which "ought to be taken into consideration."

"Ordinary improvement," as distinguished from repairs, are also a charge that "may properly be made against earnings," says Mr. Justice Bradley in an interesting discussion of depreciation in railroad property in *Union Pac. R. R. v. U. S.*<sup>6</sup>

5. Where the complainant is bound by the common or the statute law to the performance of public services and duties, the price at which it may sell its commodities must clearly be high enough to

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<sup>1</sup> 35 Fed. Rep. 866, at p. 879.

<sup>2</sup> 82 Fed. Rep. 839, 850, at p. 855.

<sup>3</sup> 174 U. S. 739, 757.

<sup>4</sup> 78 Fed. Rep. 236.

<sup>5</sup> 154 U. S. 362, at p. 407.

<sup>6</sup> 99 U. S. 402, 421, 422.

enable it properly and satisfactorily to perform these public obligations, as well as to earn a reasonable profit on its plant.

Speaking of the duties of railroad companies as common carriers and of the compensation they are entitled to receive, Judge Brewer says :<sup>1</sup> —

“They may not employ poor engineers, whose wages would be low, but must employ competent engineers, and pay the price needed to obtain them. The same rule obtains as to engines, machinery, road-bed, etc. ; and it may be doubted whether even the Legislature, with all its power, is competent to relieve railroad companies whose means of transportation is attended with so much danger from the full performance of this obligation to the public.”

6. What sum or value is to be taken as the principal in determining whether the legislative rates will yield an income unreasonably low?

This question presents difficulties, and cannot also be said to have been finally answered by any decision of the Supreme Court. We believe, however, that the answer will be found to be the sum representing the fair cash value at the time the rates are established of all the property then used by the Company in its business. This rule denies to the Company the right to collect returns upon a fictitious or inflated capital, while giving it the benefit of such additions to the plant as may have been contributed by the stockholders from earnings which would otherwise have been paid out in dividends ; and, although the question cannot be said to have been finally settled, this rule has been favored by some eminent judges and rejected, we believe, by none.

The outstanding stock and bonds may not represent money actually invested in the plant, or even if fairly representing the original cost, may be largely in excess of the present value of the property. In such cases it is well settled that the thing to be kept in mind is the value of the plant, not the amount of stock and bonds.<sup>2</sup> Conversely we may suppose the case of a corporation as much undercapitalized as most public service corporations are overcapitalized. No such case has, it is true, ever been presented for judicial decision, but if such a situation should arise, the injustice of any method of valuation, or determination of the reasonableness of rates, based upon the amount of the outstanding stock, would at once become apparent. Moreover, such a basis of decision would be inapplicable to companies the stock of which has no par,

<sup>1</sup> *Chicago & N. W. R. R. v. Dey*, 35 Fed. Rep. 866.

<sup>2</sup> 164 U. S. 578, 596-7; 169 U. S. 466, 544; 174 U. S. 739, 757.



and to individuals and partnerships. We conclude that in all cases the sum upon which the company is entitled to a reasonable return is the present value of the property actually used in its business. The judicial references to this subject are as follows :—

In the Kansas City Stock Yard case,<sup>1</sup> the Court says that “the owner is entitled to the benefit of any appreciation in value above original cost resulting from natural causes.” It would seem that he should, *a fortiori*, be entitled to any increase in value due to improvements and extensions paid for out of income.<sup>2</sup>

In Northern Pacific R. R. *v.* Keyes,<sup>3</sup> Judge Amidon says :—

“The fundamental question in all cases like these is, Will the rates prescribed by the State pay the expenses of doing the . . . business and leave to the carrier a reasonable compensation upon the fair value of the property which it employs in performing the service?”

The fair value of the property rather than the amount of stock or bonds outstanding is relied upon by the Supreme Court in *Smyth v. Ames*,<sup>4</sup> as the proper basis for determining the reasonableness of a State rate. Mr. Justice Harlan, speaking for the Court, says :—

“We hold . . . that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public.”

And in *San Diego Co. v. National City*,<sup>5</sup> Mr. Justice Harlan, speaking for the Court, says :—

“What the company is entitled to . . . is a fair return upon the reasonable value of the property at the time it is being used for the public.”<sup>6</sup>

#### 7. The mode of valuation.

Certain difficulties will generally be encountered in attempting to apply to concrete cases the test implied in such expressions as “fair cash value,” “fair value,” and “reasonable value.” To develop all the implications of these and similar expressions as applied to the class of cases with which we are dealing would carry us far beyond the limits set for this article. A few suggestions may, however, not be out of place. Waterworks, including sources of

<sup>1</sup> 82 Fed. Rep. 850.

<sup>2</sup> *Brymer v. Butler Water Co.*, 179 Pa. 231.

<sup>3</sup> 91 Fed. Rep. 47, at p. 52.

<sup>4</sup> 169 U. S. 466, at p. 546.

<sup>5</sup> 174 U. S. 739, at p. 757.

<sup>6</sup> In the lower court (74 Fed. Rep. 79) Ross, J., says at p. 83: “It is the actual value of the property at the time the rates are to be fixed that should form the basis upon which to compute just rates.”

supply and distribution systems, gas and electric lighting plants, railroads, and other properties affected with a public interest are usually not bought and sold in their entirety sufficiently often or under conditions sufficiently similar to have any "market value" in any useful or significant sense of that expression. In view of the inapplicability of the simple test of market value resort must be had to several lines of evidence, no one of which is by itself conclusive of the ultimate problem, which is, what is the present value of the plant or property considered as a whole for the purposes of its actual use. Judicial discussion of this problem has unfortunately been somewhat meagre. Applying the analogy of cases of eminent domain involving similar properties, it would seem that original cost would in most cases be admissible, though generally not very valuable evidence.<sup>1</sup>

The cost of reproducing the plant item by item, with a proper deduction for depreciation due to use and age, would also seem to be admissible,<sup>2</sup> though likely to be misleading where the assembled plant or any considerable portion of it represents a method of doing the business which by the progress of the arts and sciences has become antiquated or obsolete, or where, by reason of bad judgment in the original selection or assembling of the components of the plant or in its situation, the plant as a whole is ineffective, inadequate, or unduly expensive to run.

Among the best considered rate cases bearing upon the present question is *Capital City Gas Co. v. Des Moines*,<sup>3</sup> in the Circuit Court for the Southern District of Iowa. In his opinion Judge Woolson says:—

"Under the proof presented the plant is in excellent condition and efficiency; and the cost of reproduction appears to be the substantial equivalent of its value. . . . Returning to the attempt to ascertain the cost of present reproduction of plaintiff's gas plant, or rather of a gas plant which shall be equally efficient and capable in supplying gas to the defendant and its citizens, . . . I conclude that suitable and proper real estate could be obtained and such plant erected, mains laid, etc., with same efficiency to meet the demands of the city as that now possessed by plaintiff, for \$400,000."

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<sup>1</sup> 100 Mass. 350; 103 ib. 365; 108 ib. 535; 109 ib. 438; 141 ib. 298; 168 ib. 541; 60 N. E. Rep. 977; 76 N. Y. 121; 49 N. J. L. 1; 58 Ill. 380.

<sup>2</sup> 168 Mass. 541; 155 ib. 35; 32 Minn. 224; 135 N. Y. 116; 23 Nev. 154; 49 N. J. L. 1; 72 Fed. Rep. 829.

<sup>3</sup> 72 Fed. Rep. 818.

The passage just quoted suggests the necessity for the qualification of the test of reproductive cost already adverted to. For if the existing plant is in any respect antiquated or inefficient as compared with a new plant of modern design and of the same capacity, and shows a greater expense per unit of output or work done, then the cost of procuring such modern plant will fix the maximum sum which a prospective purchaser of the existing plant, though willing to buy, could afford to pay. The company's plant may be worth much or little, but cannot well in any event be worth more than the cost to procure a new plant of equal capacity and modern design.

In computing the cost of a plant it seems proper to include allowances for interest during construction, engineering, book-keeping, canvassing for subscribers, and all professional and contingent expenses during the period of installation, which together measure the difference in value between two enterprises similar in all respects, except that one is a "going concern" and the other prospective;<sup>1</sup> and from the cost of the new and modern plant to deduct a sum representing the shorter future life of the existing plant due to age and to the extent to which it has been allowed to get out of repair, and a further sum representing the difference in cost of operation or mechanical value between the existing plant and a new plant of modern design. The sum thus obtained would seem to approximate as nearly as possible to the fair value of the existing plant for the purpose of testing the validity of a legislative schedule of rates.

To what extent, if at all, it is proper to add to the value thus obtained a sum to represent the value of the company's franchises, may be a matter of some doubt, especially if any of the franchises were the subject of an out and out sale by the public to the company. It has also been intimated that the company's business and earnings might be taken into account; but it would seem that this is unsound, both for reasons applicable specially to this class of cases and in view of the analogy of the measure of damages in cases of eminent domain.<sup>2</sup> For purposes of taxation, also, a sharp

<sup>1</sup> 62 Fed. Rep. 853; 60 N. E. Rep. 977; 168 Mass. 541; A. C. (1893) 444.

<sup>2</sup> 82 Fed. Rep. 839, 850; 12 Cush. 605; 3 Allen, 133; 108 Mass. 535; 109 ib. 438; 117 ib. 302; 157 ib. 218; 176 ib. 101; 59 N. E. Rep. 658, 1020; 26 Fed. Rep. 417; 62 N. H. 561; 133 N. Y. 628; 35 Hun 633; 95 Pa. 426; 99 ib. 631; 107 ib. 461; 140 ib. 510; 148 ib. 429; 177 ib. 252; 190 ib. 51; 192 ib. 632; 61 N. J. L. 32; 49 Cal. 139; 32 Minn. 224; 106 Ill. 253; 111 ib. 499; 115 ib. 97; 167 ib. 85; 86 Ill. App. 392; 98 Ga. 92; 91 Tenn. 291; Cooley, Const. Lim., sects. 696, 697.

distinction is made between the value of the property of corporations (which is subject to local taxation) and the value of their franchises, good will, and business.<sup>1</sup> And it is believed that generally it will be found that the only rule which will work substantial justice to the public as well as to the Company is to omit altogether from valuations made for the purpose of determining the validity of legislative rates all items representing or purporting to represent the value of the Company's franchises (except, perhaps, franchises for which the Company has actually paid the public), business, profits, and good will. In any event it may be asserted with confidence that any method of valuation based upon a capitalization of earnings for any period, or upon the selling value of the Company's stock (whether the property is overcapitalized or undercapitalized), is wholly inadmissible.

8. What constitutes a reasonable return?

The rate of compensation to which the company is entitled is a question as yet unsettled, and one which is perhaps incapable of a specific answer applicable to all cases. Mr. Justice Brewer, in his decision in the *Dey case*,<sup>2</sup> seems to have thought that any net return, however small, was sufficient to meet the requirements of the Fourteenth Amendment; but, as pointed out by Mr. Justice McKenna in the *Southern Pacific case*,<sup>3</sup> this view was retracted by Judge Brewer in his decision as Circuit Judge in the *Union Pacific case*,<sup>4</sup> and "has received no judicial sanction since."

It would seem that the just rate of compensation would be that determined by the percentage of net profit expected and commonly obtained in enterprises not affected with a public interest and involving about the same business risk. The tendency has been, however, to seek for a more easily ascertainable and more arbitrary test. In the *Kansas City Stock Yard cases*,<sup>5</sup> a legislative rate which allowed 5 3-4 per cent profit on the value of the property after all expenses and an allowance for depreciation was held not to be in violation of the Fourteenth Amendment; and Judge Foster, in the first of these cases, suggests that "doubtless the rate fixed by law for interest on money furnishes a test of which the investor

<sup>1</sup> 12 Mass. 252; 11 Allen 268; 12 ib. 75; 13 ib. 391; 16 Gray 38; 98 Mass. 19, 25; 99 ib. 146; 100 ib. 399, 403; 144 ib. 598; 146 ib. 403, 412; 6 Wall. 611, 632. See, also, 48 Hun 193; 158 N. Y. 162, 168; 144 Pa. St. 365; 67 N. H. 514.

<sup>2</sup> 35 Fed. Rep. 866.

<sup>3</sup> 78 Fed. Rep. 236, at p. 261.

<sup>4</sup> 64 Fed. Rep. 165.

<sup>5</sup> 79 Fed. Rep. 679; s. c. 82 ib. 839, 850.

cannot complain, although in many cases it might be oppressive to the general public."<sup>1</sup>

*B. If the rate has been fixed arbitrarily or inconsistently so as to discriminate against the complainant with regard to other persons or corporations similarly situated, it is obnoxious to that part of the Fourteenth Amendment which prohibits the States from denying to any person within their jurisdiction the equal protection of the laws, irrespective of the question whether it is in itself unreasonably low.*

For this provision means that the law and its administration must be impartial and not characterized by arbitrary or capricious discrimination between persons.<sup>2</sup> In *Wilmington & W. R. Co. v. Commissioners*,<sup>3</sup> a bill in equity to restrain the Attorney-general of a State from enforcing rates established by a State Railroad Commission was sustained on exceptions, the material allegations of the bill being that the Commissioners' order was inconsistent with prior orders of the same body, and with its action in regard to other railroads in the State in such a way as to amount to an arbitrary discrimination.

It may be added that it is in cases of this sort that a refusal of the State legislature, board, or commission to afford the party affected any opportunity to be heard may be important,<sup>4</sup> as would the fact that the reasons assigned by the Commissioners were wholly irrelevant, or a mere cover for action in reality based upon improper reasons.<sup>5</sup> So a discrimination between classes, as a law compelling a company to transport a certain kind of freight or a certain class of passengers, or to carry on a certain part of its business, at a loss, has been thought obnoxious to the Fourteenth Amendment.<sup>6</sup>

Insistence on a uniformity of rates under similar conditions may give rise to many embarrassments. Suppose that a company can, owing to exceptionally able management in the past or present, sell at a much lower rate than the average rate necessary to

<sup>1</sup> See, also, *Milwaukee El. R. R. & L. Co. v. Milwaukee*, 87 Fed. Rep. 577; *San Diego Water Co. v. San Diego*, 118 Cal. 556; *Brymer v. Butler Water Co.*, 179 Pa. 231.

<sup>2</sup> *Yick Wo v. Hopkins*, 118 U. S. 356; *Gulf, etc., R. R. v. Ellis*, 165 U. S. 150. *Lake Shore M. & S. R. R. v. Smith*, 173 U. S. 684; *Trustees Cincinnati Ry. & Guenther*, 19 Fed. 395; *Jew Ho v. Williamson*, 103 Fed. Rep. 10.

<sup>3</sup> 90 Fed. Rep. 33.

<sup>4</sup> *San Diego Water Co. v. San Diego*, 118 Cal. 656, 575.

<sup>5</sup> *State of Ohio, ex rel., etc., v. Cincinnati Gas, etc., Co.*, 18 Ohio St. 262.

<sup>6</sup> 169 U. S. 466, 541; 173 U. S. 684; 61 Kans. 439; 31 L. R. A. 47.

return a reasonable profit to other companies similarly situated, is it permissible to reduce the rates of such company below this average? This question has never been adjudicated; but it has often been declared that the interests of both parties are to be kept in view, and that the fair value to the community of the service in question is to be regarded as well as the company's right to a reasonable return upon its investment.<sup>1</sup>

*N. Matthews, Jr.,  
W. G. Thompson.*

BOSTON, October, 1901.

[*To be continued.*]

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<sup>1</sup> 164 U. S. 578, 596; 169 U. S. 466, 543; 173 U. S. 684, 687; 174 U. S. 739, 753, 757.

## MIXED QUESTIONS OF LAW AND FACT.

**I**N the illuminating book called "A Preliminary Treatise on Evidence at the Common Law," in which Professor Thayer has done so much, all through the outlying regions of evidence, to make the crooked straight and the rough places plain, there is a chapter devoted to the subject of "Law and Fact in Jury Trials." In its course, the author deals, among other things, with those questions which arise in negligence cases, and in other cases that turn upon the point of what is reasonable in conduct, and which are often described and referred to by the phrase "mixed questions of law and fact."

This phrase Professor Thayer condemns as inapt and misleading. He says:<sup>1</sup> —

"Baptizing the question of reasonable and probable cause with this name, as a 'mixed question of law and fact,' common and almost universal as it is, has only added to the confusion. All questions of fact, for a jury or for a court, are mixed questions of law and fact; for they must be decided with reference to all relevant rules of law; and whether there be any such rule, and what it is, must be determined by the court. Now since this mixture of law and fact is thus common to a variety of different situations, it is an uninstrusive circumstance to lean upon when one seeks for guidance in discriminating these situations."

Again, he says,<sup>2</sup> in speaking of "the matter of reasonableness in general:" —

"The characteristic of all such questions is the same. The only rule of law is one which appeals to an outside standard, that of general experience; and the application of it, by whatever tribunal made, calls for a preliminary determination of something for which there is no legal test, — a matter of fact, and not a matter of law, — namely, the behavior, in a supposed case, of the prudent man. If the settling of such a question be matter of fact in ordinary cases of negligence, it is equally so in cases of malicious prosecution and false imprisonment; for saying this, notwithstanding the careless phraseology of our books, there is abundant authority."

Yet in spite of the passages just quoted and the weighty authorities which are marshalled in their support, it seems to the writer

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<sup>1</sup> At pages 224-225.

<sup>2</sup> At pages 227-228.

that the question of reasonableness, together with some other questions upon which courts or juries have to pass, may usefully be discriminated, on the one hand, from pure questions of law, and on the other hand, from ordinary questions of fact and of opinion as to fact; and that the phrase "mixed question of law and fact" points with accuracy to a real difference upon which the discrimination is grounded. Let it be said for clearness, that in calling a given question a question of fact or a question of law, it is here intended to refer to the nature of the inquiry which forms its subject, without regard to whether it is an inquiry to be answered by a court or by a jury.

In the first place, while it is true in a sense that "all questions of fact, for a jury or for a court, are mixed questions of law and fact; for they must be decided with reference to all relevant rules of law," is it true in the natural or ordinary sense of the phrase? Should we not rather say that, in most cases, there arise, not a mixed question of law and fact, but separable questions, one of law and one of fact; and that if we can only find out just what the law is and just what the fact is, the application of the law to the fact, which is where the mixture comes in, is perfectly simple, and presents no question at all? For instance, in a proceeding against a man whose building is claimed to exceed a height limited by the building laws, the court can tell the jury what is the legal limit of height — a question of law — and the jury can determine what is the height of the building — a question of fact, — and then, if the permitted height is found to be ninety feet, while the actual height is found to be one hundred feet, it takes no profound mental operation to conclude that the building is in excess of the height permitted. The conclusion is a mixed conclusion of law and fact, but the questions on the answer to which the conclusion depends are separable questions, one of pure law, the other of pure fact.

In the case just put, the rule of law admits of clear and precise statement. Every one knows what ninety feet is. There can be no difference of opinion about it. The "standard which it is the duty of [the] judicial tribunal to apply," to use the words Professor Thayer employs,<sup>1</sup> when speaking of law as contrasted with fact, is a certain one; "the determination of the exact meaning and scope of it" is easy; "the definition of its terms" is not required. But these things are not always so. For example, there has been much discussion among critics as to whether Hamlet was insane;

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<sup>1</sup> At page 193.



and yet even after it is settled what is meant by Hamlet, whether a conception in Shakespeare's mind, or an impression produced upon the reader's mind, or an imaginary person possessing the qualities which a real person should be inferred to possess, if he had said and done the things that Hamlet says and does in the play, there still remains the question what insanity is. This generally passes *sub silentio*; unanimity is taken for granted; and yet when all is over, we find that the difference between critics proceeds about as much from difference of opinion as to what constitutes insanity as from difference of opinion as to the condition of Hamlet's mind. The condition of Hamlet's mind is matter of fact, or would be, if the imaginary Hamlet had been a real person. What constitutes insanity is a matter of a different sort; and these two matters, though presented in a single question, as if there were only one thing to be inquired about, are matters which need to be separated and kept separate.

To put this in general language, we may say that most questions call for a comparison of one thing with another. The thing to be compared is denoted by the first term, and the thing with which it is to be compared — the standard — is denoted by the second term. To make the comparison it is not enough to know in a general way what thing is pointed out as a standard: we must also be acquainted with this thing, and know the relevant qualities it possesses, and the degree to which it possesses them. If asked whether A is as tall as B, that is to say, whether A's height equals B's height, it is not enough to know who B is, and what is meant by his height, we must also know what his height is. If asked whether X has acted prudently, it is not enough to know in a general way what the word "prudence" means; we must know what the thing prudence is; what qualities it comprises, and in what degree a man must possess them in order to be called prudent. When that matter has been settled, so that there is no difference of opinion about it, then and only then, does the question present an inquiry into a single, unmixed question of fact, to wit, the character of X's conduct. Yet when a question of this kind is asked, it is generally taken for granted that all agree as to the exact nature and measurement of the standard of comparison which is set up. It is the falsity of this assumption, for it frequently is false, especially where the standard is denoted by some abstract word like prudence, insanity, or necessity, which is at the bottom of much misconception and arguing at cross-purposes; because until people know what they are disagreeing about, they

can rarely discover why they disagree. If questions are submitted to juries, or passed on by courts, in which the standard is denoted only by vague words, and is not precisely defined and measured, it is important to recognize the fact.

To illustrate such a situation by a non-legal example, suppose a jury of artists, selected at an exhibition of paintings with instructions to award medals to pictures of artistic excellence. If two of the artists, looking at the same picture, and seeing it in the same way, disagree as to whether it is entitled to a medal, they may differ in their estimate of the picture's merit, or they may agree as to the merit it possesses, but differ as to the degree of merit which it should possess in order to have artistic excellence. In the one case, they differ as to the character of the picture, a difference as to fact. In the other, they differ as to the standard which is to be applied to it. That is a difference about the rule or law which is to govern their decision; a difference which is possible, because the standard, namely, "artistic excellence," is indefinite. Given a building of known height, and reasonable men cannot well differ as to whether its height exceeds ninety feet. Given a picture calculated to make a known impression upon the beholder, and experts often cannot agree as to whether it deserves a prize. Obviously no definition of artistic merit can be framed that will resolve the difficulty; for it arises, not from faulty expression, but from the nature of the subject. What it takes, in quality and in degree, to make merit is and must remain a matter of opinion; and therefore the same men who decide what pictures are to receive prizes, inevitably and in the course of that very decision, set, as they are intended to set, the standard of merit to which the pictures shall conform. They are judges of law and fact. The alternative is only to adopt some other rule for awarding prizes than that of merit as such.

Similar situations arise in some classes of controversies at law. When it is disputed whether goods supplied to an infant were necessities, the question may logically be divided into four parts. 1. What were the goods supplied, a simple question of fact. 2. How necessary were they to the infant, that is to say, to what degree of inconvenience would he be put if he had to go without them, a question of opinion as to fact. 3. What degree of inconvenience is requisite to make the articles necessary within the law, a question of law, because it sets the standard to be applied in every case of the sort, and is not related to the particular questions arising in the specific case. 4. Is the inconvenience which

it has been ascertained that the infant would have experienced if deprived of the goods, as great as the inconvenience which has been ascertained to be requisite for making them necessary?

It is the last question alone which involves the application of law to fact, and which, therefore, we might call a mixed question of law and fact, if we used the phrase in that sense in which we may say that every case involves such a mixed question; but here, as in every other case, it is a question that answers itself as soon as the other questions in the case have been answered, and so is practically no question at all.

The third question is primarily for the judge, and he may explain the subject to the jury as clearly as he can. But since it comes to a matter of opinion, — what is “reasonably” necessary, — it does not admit of precise definition; it remains inevitably a question of degree, and the jury are furnished with a criterion which they can apply only by the exercise of their judgment as to what it is; and in exercising that judgment they are making a judgment as to what the law is. Probably in close cases, verdicts often depend upon the meaning the jury attaches to the word “necessary.”

So in an action for negligence. If the jury is asked whether the defendant was negligent, the inquiry upon analysis resolves itself, as in the previous case, into four parts: what was the defendant's conduct; what was the character of such conduct, or, in other words, what degree of avoidable risk to others did it involve; what character must conduct possess to be negligent, that is to say, in substance, what degree of avoidable risk to others is necessary to constitute negligence at law; and finally, whether the degree of risk involved was equal to that which the law stamps as negligent. In giving a verdict in a case like this, a jury passes upon law when it decides what degree of risk a man must avoid, or, since risk is avoided by taking care, how careful a man must be, to escape responsibility. That is to set the legal standard of carefulness.

A jury cannot escape from passing upon this matter of law, unless they can be referred to some matter of fact which will serve itself as a standard of carefulness with which the conduct of the parties may be compared, and thereupon approved as prudent or condemned as negligent, as it equals or falls short of the standard set. It is commonly said that the care which is due in a given case is that which a prudent man would exercise under the circumstances, if the risk were to his own person or property; and juries are asked to say whether a party has acted like a prudent

man. This is often spoken of as if it were a complete definition of negligence, as if it translated it into terms of pure fact. But though it goes some way toward the goal, it does not nearly reach it. It tells us to be sure that one should take the same care for the interests of others that he would, if prudent, take for himself. But when we come to the crux of the question, and ask how much care a man would, if prudent, take for himself, we get no answer. To set up for a test the conduct of a prudent man is partially to explain the question of negligence, by substituting concrete for abstract terms, but it is not in the least to answer it, or to substitute fact for law. "An act hath three branches ; it is, to act, to do, and to perform : " volition, process, and accomplishment. So to act with discretion hath three branches ; it is to be prudent, to take care, and to avoid negligence. He who acts from prudence as a motive takes due care as a means, and escapes negligence as a result. Those are different features of the same thing. A prudent man is a man that takes due care, and to define due care as the care exercised by a prudent man is merely to say that it is the care which is exercised by a man that exercises it. It is Polonius's definition, — "for to define true madness, what is it but to be nothing else but mad." Though perfectly true, the statement is only moderately helpful. Yet the common instruction of courts which expresses negligence in terms of prudence is frequently referred to as if it left a residuum of mere fact for the jury to deal with. "What is it that the law requires me to do to avoid being negligent ?" asks a defendant of a judge. "To be prudent," says the judge, "and I will leave it to the jury to say whether you obeyed the dictates of prudence, but perish the thought that I am leaving it to the jury to say what the dictates of prudence are."

To be sure, if there were definite individuals known as prudent men, and if we could tell how they would behave under given circumstances, or if under given circumstances there were a line of conduct recognized as prudent, and we could find out what it was, the so-called definition would point to outside fact, and would furnish a standard by which conduct might be judged. But no such things exist. The prudent man is imaginary. It would be safe to bet on his acting prudently, though the heavens fell ; but so long as we have to derive our notion of his conduct from our notion of what is prudent, we cannot derive our notion of what prudence requires from our notion of what he would do.

Nor does it furnish the jury with a matter of fact, which they may take as a measure of the quantum of care that the law re-

quires, to refer them to general experience. Certainly a juryman, if sensible, will found his belief about prudence upon his experience and upon what he supposes to have been the experience of others. Every one does or should found his opinions about what is prudent, just, moral, or expedient, whether in politics, business, or personal affairs, on experience as he interprets its teachings. When men differ about what it is proper to do, you cannot help them by saying that that is proper which general experience shows to be proper, for the teaching of experience is the thing they are disputing about. The complexity and diverseness of experience is the source, not the solution of the difficulty.

Moreover, it is hard to see how general experience, considered as a matter of fact, can furnish a standard for anything. A standard is something singled out from other things. General experience means things in general, with nothing singled out. To point out everything is to point out nothing. It is to perplex, not to simplify. But when it is said that the law of negligence appeals to the outside standard of experience, what is meant is that that is prudent which experience shows to be prudent; and the thing really referred to is not experience, which is matter of fact, but an inference to be drawn from experience, which is a matter of a different sort. It is the teaching of experience by which the conduct of the parties is to be tried, and it is the jury that is to decide what its teaching is. To furnish jurors for guidance with an inference to be drawn by themselves does not give them a legal measure of due care, it makes them supply the legal measure. It makes them judges of law. It is precisely because there is no legal test for negligence that the jury have to establish a test for it.

In a close case the question what care was under the circumstances due is as important and difficult as the question what care was taken; and jurors are as likely to differ or to be in doubt about it. Their doubt or difference cannot be removed by the court, even if it can be detected. For the word "prudence" is not capable of precise definition, or rather, the thing prudence is indeterminable and rests in opinion. Prudence includes ability to foresee what is likely to happen, and the chances of its happening; practical wisdom to tell whether it is well to have it happen, and to devise means for bringing it about or avoiding it; and besides all this, self-control to act as foresight and wisdom direct. To what degree a man may fairly be expected to exercise these qualities, even in his own affairs, is a question that a juryman of rash,

impulsive temperament will probably answer differently from one who by nature is overcautious.

The thing to be determined is not what the average man does, but what the average man may fairly be required to do. The prudent man may fall below or be required to rise above the average of care. The question of what is prudent, or more generally, what is reasonable, is the question of what is expedient, justifiable, or proper. Its appeal is to the practical, not the logical, reason. It is a question of ethical, not of physical, fact; of what ought to be, not of what is. It is a question which the substantive law should answer if possible; which the substantive law does answer as far as is possible; which it then generally turns over to the jury for them to answer, because in spite of the fact that the question is one of law, it has been unable, since the question is also one of opinion and of degree, to translate it into terms of fact by a definition that measures and defines.

Such a definition has, however, sometimes been furnished by statutes or by rules laid down by judges, which, by deciding the fact as to the character of given conduct, establish a new and definite rule of law. Such is the New Jersey statute which provides that a passenger, injured in getting off a train before it has stopped, shall be deemed guilty of contributory negligence. But when a judge tells a jury that a defendant must act as a reasonable or as a prudent man would act, he is not really laying down the rule of proper conduct by which the defendant's acts are to be judged; he is only indicating the principle that is to govern the jury's decision of it. It is the same, so far as the nature of the operation goes, as if in all cases charges to juries consisted simply of the statement that the law required parties to deal justly, to conform to the standard of the conduct of the just man, and on that alone it were left to them to determine what justice required in each particular case. Would it conduce to a clear understanding of the part played by juries in the administration of law to say that such juries were judges of mere matter of fact?

Questions of law of a similar nature may arise in cases involving the interpretation of statutes. The question of the meaning of the terms of a statute is a question of law, because it is a question as to what the law means, and what the law means, that it is.

So in *Commonwealth v. Sullivan*,<sup>1</sup> where the question was whether a certain game was a lottery within a statute, Holmes, J., said:—

“This having been determined to be a lottery in *Commonwealth v.*

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<sup>1</sup> 146 Mass. 142, 145; Thayer, Prelim. Treat., 216.

Wright, it is not necessary to go on forever taking the opinion of the jury in each new case that comes up. Whether or not a definitely described game falls within the prohibition of a statute is a question of law. The defendant was bound to know at his peril. Whatever uncertainty courts may have felt upon a subject with which they are less well acquainted than some others of the community, in theory of law there is no uncertainty, and the sooner the question is relieved from doubt the better."

In that case, the character of the game seems to have been clear, so soon as one knew the way it was played, and the only thing left to find out was whether a game of that character was prohibited by law. But in the English case of *Pearce v. Lansdowne*,<sup>1</sup> there was need of an inference from the facts as proved, in order to determine their character. The question was whether a potman at a public house was a workman and not a "domestic or menial servant" within an Employer's Liability Act. The evidence as to the potman's duties was uncontroverted, and upon it the trial judge held that he was a domestic or menial servant. The appellate court severely rebuked him for having usurped the province of a jury. Their criticism seems well founded, for he undertook not merely to decide what the statute meant by menial servant, or, in other words, what the nature of an employee's position must be to make him a servant within the act (a matter which he might have explained to the jury by definition or otherwise) but also to draw an inference of fact, from the evidence, as to what the nature of the potman's position was. Perhaps the judge gave greater weight to the fact that the potman served beer to customers, as compared with the fact that he slept at his own house, and not at his employer's house, than a jury would have done. If so, he was treating a question of fact differently from the way a jury would have treated it. It was as if a judge and jury inspecting the portrait of a person present in court should differ as to how good a likeness it was. That would be a question of fact. How good a likeness it would have to be to oblige the sitter to pay for it would be a question of law. A judge who undertook to answer both questions would be doing what the trial judge did in *Pearce v. Lansdowne*.

If the foregoing observations are well founded, it would seem that there remains a question which in its nature is a question of law wherever the legal standard which is to be applied to the facts is not stated in terms so definite and clear as to leave no room for difference of opinion as to what it is that the law requires. Where

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<sup>1</sup> 69 Law Times Rep. 316; Thayer, Prelim. Treat., 216, note.

there is room for such difference of opinion, the tribunal which applies the law to the fact, that is to say which decides whether the facts as found fulfil the requirements of the law as stated, interprets the law in making its decision, and really decides what its requirements are. In a general verdict the jury makes the application of law to fact ; where the verdict is special, the judge makes it.

There is room for such difference of opinion, where the case requires the drawing of an inference of fact as to the character of the primary facts proved, such as whether conduct is prudent, delay reasonable, or a prosecution founded upon probable cause. For the question of character so raised is a question of opinion and of degree, and hence the words in which it is expressed are necessarily indeterminate, while the decision reached can only be stated in the terms of the rule of law which is to be applied to it. A special verdict is consequently impossible, and the same tribunal which characterizes the facts must interpret the law. For example, the jury in an action for negligence can only say whether the defendant was or was not negligent, and that mixes a decision as to the character of conduct with a decision as to the degree in which a man is required by law to exercise foresight, wisdom, and self-control. Since law and fact are thus inseparable, the jury must pass upon both, or the court must pass upon both.

In such a situation, it would seem reasonable to ascertain whether the question of fact or of law is the more difficult and important, and to assign the decision of both to jury or to judge accordingly. Such a result seems to have been reached in practice ; for juries pass upon questions of negligence, where the facts are complex and go to the root of the case ; and courts pass upon questions of probable cause, where the relevant facts are comparatively simple, and the jury may well be believed more likely to err as to the legal standard against which they are to be measured than the judge to err as to the inference of fact to be drawn from the primary facts as found.

Some lawyers in some jurisdictions have professed to remark a tendency in juries to make the law a respecter of persons, not to say a non-respecter of corporations, by varying the degree of care exacted of one party according to the degree of sympathy felt for the other. Divers remedies have been proposed. In considering the causes of the trouble and the propriety and feasibility of trying to correct it, it is material to notice that a jury in such a case attempts to exercise the somewhat anomalous function of judging law.

*Frederick Green.*



## THE INSULAR CASES.

## II.

DRED SCOTT *v.* SANDFORD.

THE most glaring case of misconception is in connection with the Dred Scott case. As to this case Mr. Justice Brown says :—

“It must be admitted that this case is a strong authority in favor of the plaintiff, and if the opinion of the chief justice be taken at its full value it is decisive in his favor.”

I shall attempt to show that as to the issue here, whether the Constitution is operative in the territories, it is to be “taken at its full value.” There was no dissent upon that point. The ways parted when the effect of the Constitution thus operating was considered. Mr. Chief Justice Taney held that the Constitution recognized property in a slave, and protected that property against adverse legislation. On this point Mr. Justice McLean and Mr. Justice Curtis dissented. As to the operation of the Constitution in the territories, Mr. Chief Justice Taney said :—

“It [the government] enters upon it [a territory] with its powers over the citizens strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty.”

“The Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved. . . . It has no power of any kind beyond it, and it cannot, when it enters into a territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it.”

Mr. Justice Wayne and Mr. Justice Grier concurred fully in the opinion of the chief justice. Mr. Justice Nelson expressed no opinion on this question. Mr. Justice Daniel said :—

“Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution [territory or other property clause] a power to destroy or in any wise to impair the civil and political rights of the citizens of the United States.” . . .

Mr. Justice Campbell said :—

“I look in vain among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to

the United States, or that they might thereafter acquire. I seek in vain for an enunciation that a consolidated power had been inaugurated, whose subject comprehended an empire and which had no restriction but the discretion of Congress."

Mr. Justice McLean said :—

"No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit ; . . . This is the limitation of all the Federal powers."

"No implication of a power can arise which is inhibited by the Constitution, or which may be against the theory of its construction."

Mr. Justice Curtis said :—

"If, then, this clause [territory and other property clause] does contain power to legislate respecting the territory, what are the limits of that power? To this I answer, that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things ; that, in the exercise of legislative power, Congress cannot pass an ex post facto law or bill of attainder ; and so in respect to each of the other prohibitions contained in the Constitution."

The counsel for Dred Scott made this admission in his argument : "I admit that whether the power of Congress to legislate be given expressly or by implication, it is given with the limitation that it shall be exercised in subordination to the Constitution, and that if it be exercised in violation of any provisions of the Constitution the act would be void." No matter what has happened since the Dred Scott case, a proposition as to which both sides agreed cannot be said to have been impaired.

*The Monthly Law Reporter* for June, 1857, contains a very able and exhaustive review of the Dred Scott case of fifty-three pages, ascribed to John Lowell and Horace Gray, Jr., Esquires (now Mr. Justice Gray of the United States Supreme Court). The article makes no criticism of the proposition that the Constitution extends to the territories, but concedes it, saying : "In no previous case in the courts has it ever been suggested that the power of Congress to govern the territories was limited in any respect, except by the *express provisions of the Constitution*," and cites with approval Mr. Justice McLean's statement that "the Constitution was formed for our whole country. The expansion or contraction of our territory required no change in the fundamental law." It pronounces the highest encomium upon Mr. Justice McLean's and Mr. Justice Curtis's opinions, saying of the latter that "by the common consent

of the profession and of the public" it was "the strongest, clearest, as well as the most thorough and elaborate of all."

Abraham Lincoln, in his great debate with Douglas, bitterly and savagely attacked the Supreme Court for its decision in the Dred Scott case. He went so far as persistently to charge the majority with having entered into a conspiracy against liberty. He never criticised the proposition that the Constitution controlled Congress in legislating for the territories. He conceded that. In his Galesburg speech he defined his position thus :—

"The essence of the Dred Scott case is compressed into the sentence which I will now read : 'Now as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution.' I repeat it, '*the right of property in a slave is distinctly and expressly affirmed in the Constitution.*'"

The perpetuation of slavery by the Constitution, not the extension of the Constitution to the territories, was in his view the infamy of the Dred Scott case. It was this that made Sumner call the Supreme Court a "barracoon." A base and studious effort outside of the court has been made to show that the theory that the Constitution controls Congress in legislating for the territories is the special property of Calhoun, and if overthrown another nail is driven in the coffin of Calhounism ; another clod placed upon the grave of disunion and slavery. It proceeds from insufficient knowledge or pure demagoguism.

Politically, constitutional control was first announced by the Liberty Abolitionist party in 1844, in their platform, in these words :—

"*Resolved*, That the general government has, under the Constitution, no power to establish or continue slavery anywhere, and therefore that all treaties and acts of Congress establishing, continuing, or favoring slavery in the District of Columbia, in the Territory of Florida, or on the high seas, *are unconstitutional*, and all attempts to hold men as property within the limits of exclusive national jurisdiction ought to be prohibited by law."

In 1856, the Democratic party, in its platform, although it made frequent reference to the Constitution and declared that Congress had no power under it to control "the domestic institutions of the several states," took no position on the constitutional limitations on the power of Congress to govern the territories, and in 1860 it expressed no opinion upon this question, but contented itself with

the declaration that "as differences of opinion existed" as to that point, "that the Democratic party will abide by the decision of the Supreme Court of the United States on the questions of constitutional law." They did not deny the principle, but they did not affirm it. On the other hand, in 1856, the Republican party made the operation of the Constitution over the territories an article of party faith, the second plank of their platform being : —

*"Resolved, That, with our Republican fathers, we hold it to be a self-evident truth that all men are endowed with the inalienable rights to life, liberty, and the pursuit of happiness, and that the primary object and ulterior design of our Federal Government were to secure these rights to all persons within its exclusive jurisdiction; that, as our Republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing slavery in the United States, by positive legislation prohibiting its existence or extension therein; that we deny the authority of Congress, of a territorial legislature, of any individual or association of individuals, to give legal existence to slavery in any territory of the United States while the present Constitution shall be maintained."*

Here is an express recognition and reliance upon the proposition that the Constitution controlled Congress in legislating for the territories. In 1860 it denounced the slavery feature of the Dred Scott decision and affirmed its position on the Constitution and territories as follows : —

#### SECTION 7.

*"That the new dogma, — that the Constitution, of its own force, carries slavery into any or all of the territories of the United States, — is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency and subversive of the peace and harmony of the country."*

#### SECTION 8.

*"That the normal condition of all the territory of the United States is that of freedom; that as our Republican fathers, when they had abolished slavery in all our national territory, ordained that 'no person shall be deprived of life, liberty, or property without due process of law,' it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any*

*individuals, to give legal existence to slavery in any territory of the United States."*

The Republican party upon this platform entered upon and fought its great battle for human liberty. Because it waged a successful warfare it can hardly be said that the principles for which it fought were overthrown in the contest. The Republican party said the Constitution went to the territories, and carried liberty with it. It is immaterial who originally championed the extension of the Constitution to the territories, nor does the fact that it was once prostituted to a base purpose concern us. It has been dedicated to freedom. The Republican party has never by any platform utterance reversed its position on this question. This great principle was jauntily described by Benton as a "vagary." In the light of this history how can it with any propriety be said of the only proposition laid down in the Dred Scott case that is raised here, that "the country did not acquiesce in the opinion, and that the civil war which shortly thereafter followed produced such changes in judicial as well as public sentiment, as to seriously impair the authority of that case"? That may be said of the slavery branch of the proposition, as to which there was an "irrepressible conflict," but not as to a proposition upon which all agreed.

Mr. Justice Brown suggests "that in view of the excited political condition of the country at the time, it is unfortunate that he [Mr. Chief Justice Taney] felt compelled to discuss the question upon the merits," but that does not impair the authority of a principle as to which the contending parties stood on common ground. In any event this is to be said of Mr. Chief Justice Taney's opinion, assuming that it passed upon a question uncalled for by the issue presented, there is nothing in the language of his opinion that indicates it was being rendered for a purpose, that it had in view any political considerations, or allowed any consequences to influence the result. Can as much be said of those who criticise him? In the Dred Scott case, the court worked out from a conceded proposition, indorsed by the Republican party, an erroneous conclusion, utterly repugnant to the enlightened Christian conscience of a free people, in order that the slavery of a race might be made enduring. In the Downes case, a disagreeing court with one majority reverses this admitted principle, emancipates the Congress from the control of the Constitution, in order that a land of vast fertility and great resources, and ten millions of people and millions yet unborn, may be forever subjected to the commercial servitude and the un-

restrained will of the Republic. In this connection I call attention to the fact that Mr. Justice Brown finds it necessary to call again upon the great authority of Webster, the "expounder of the Constitution," and to cite Benton and Clay to buttress his cause.

He quotes Webster as saying, in discussing the proposition to extend the provisions of the Constitution to the territories by act of Congress, that the "scheme" was an "absurdity" and an "impossibility." Yet it is not only now conceded on all hands that it can be done, but it is now claimed that once done it cannot be undone. He further quotes him as saying "that Congress governed the territories independently of the Constitution, and incompatibly with it; that no part of it went to a territory but what Congress chose to send [that is, you could send it piecemeal, but not in bulk]; that it could not of itself act anywhere, not even in the states for which it was made, and that it required an act of Congress to put it in operation before it had effect anywhere." This last suggestion would be startling if it did not on a moment's examination appear to be clearly absurd. Note that the assertion is general, and does not discriminate between the provisions of the Constitution conferring powers to be exercised, and imposing restrictions upon the exercise of power. That a power to be exercised is dormant and inoperative even in a state until it is put in operation by an act of Congress, we can understand, but the suggestion that a limitation or restriction upon the exercise of a power (and that is the question here) cannot operate "anywhere, not even in the states," until the body to be restrained sees fit to impose the restraint, is an absurdity that would be monumental if it had not been uttered by Webster. It illustrates the superficial manner in which he discussed the question. An examination of the debate from which the quotation is made shows that Webster's part in it was incidental and impromptu, as all he said does not occupy a page in the *Globe*. Unmindful of the fact of the distinction between political and civil rights, and that political rights furnish no test of the existence of civil rights, and forgetful that Mr. Chief Justice Marshall in the *Loughborough* case distinctly overruled that point, he still presses the representative idea as the sole test. He said:—

"The Constitution — what is it? We extend the Constitution of the United States by law to territory. What is the Constitution of the United States? Is not its very first principle that all within its influence and comprehension shall be represented in the Legislature which it establishes, with not only a right of debate and a right to vote in both

Houses of Congress, but a right to partake in the choice of President and Vice-President?"

It has been discovered by experience that these direful results have not followed from the terrible act of extending the Constitution. As Webster saw the Constitution go out, he could see a United States Senator coming in. Of what special value is his opinion when he thus confuses political privileges and legal rights? He said further in the debate :—

"How do you arrive at it by any reasoning or deduction? It can only be arrived at by the loosest of all possible constructions. It is said that this must be so, else the right of *habeas corpus* would be lost; undoubtedly these rights must be conferred by law before they can be enjoyed in a territory."

That is, the right of *habeas corpus* does not exist in a territory unless conferred by Congress, if Webster's view was sound. Is the court prepared to hold that the inhabitants of Porto Rico and the Philippines can be arbitrarily restrained of their liberties without form or process of law, and it cannot be inquired into and relieved by *habeas corpus* unless Congress shall have so determined? It is a well-known fact that in at least one instance the powers that be have declined to face that issue. Perhaps nothing can better illustrate the reckless extravagance with which Webster stated legal propositions in this debate than his assertion that the fact that the Constitution did not extend to the territories had been "decided by the United States Court over and over again for the last thirty years," when the fact is that he had been gathered to his fathers nearly forty-nine years before any such decision ever illumined our jurisprudence, and twenty-nine years before he spoke the court had in effect held that it did.

It is unjust to the reputation of this great man to allow it to stand upon the loose and superficial statements in this debate in 1849. His purpose then was, no doubt, to repel the advance of slavery. With the same purpose in view in 1848, he made a great speech against the Mexican war, filling fifteen columns in the *Globe*, evidently the result of careful preparation. He discussed the precise question involved here, the acquisition of new territory, and the constitutional difficulties involved therein. On that he said :—

"Arbitrary governments may have territories and distant possessions, because arbitrary governments may rule them by different laws and different systems. Russia may rule in the Ukraine and the provinces of

Caucasus and Kamschatka by different codes, ordinances, or ukases. We can do no such thing. They must be of us, *part* of us, or else strangers. I think I see that in progress which will disfigure and deform the Constitution. . . . I think I see a course adopted which is likely to turn the Constitution of the land into a deformed monster, into a curse rather than a blessing; in fact a frame of an unequal government, not founded on popular representation, not founded on equality, but on the grossest inequality, and I think that this process will go on until this Union shall fall to pieces. I resist it to-day and always."

When his attention is concentrated upon the precise issue he does not appear to be of much assistance to the learned Justice. It is not surprising that this 1848 speech appears in his collected works with some slight revision, showing that it had passed under the master's hand, while that of 1849 has been allowed to moulder under the dust of the Congressional Globe.

As to Benton, if we are to be governed by his views, we need give ourselves but little concern, as he starts his examination of the Dred Scott case with the assertion that the questions were "political, affecting Congress in its legislative capacity, and on which the Supreme Court has no right to bind or control that body." It is perhaps enough to say of Mr. Benton that this jurisconsult affirmed Mr. Webster's loose suggestions, saying:—

"In the second place, it cannot operate anywhere, not even in the states for which it was made, without acts of Congress to enforce it. This is true of the Constitution in every particular."

And as he was nothing if not emphatic, in order to be precise, he said:—

"Every part of it is inoperative until put into action by a statute of Congress."

He went even farther, and claimed that it could not be done, saying:—

"And if the Constitution was extended to the territories (which it cannot be)."

A section of an act reading, —

"And be it further enacted, That the Constitution and laws of the United States are hereby extended over and declared to be in force in said territories of California and New Mexico, so far as the same, or any provision thereof, may be applicable," —

he declared to be "of absurd impossibility," when so great has been the increase of light since his day that four of the majority



hold that the Constitution is in force in the territories without the aid of statute so far "as applicable."

For the purpose of showing that he sustained this theory of legislative absolutism, Mr. Clay is quoted in this connection as saying :—

"The idea that, *eo instanti* upon the consummation of the treaty, the Constitution of the United States spread itself over the acquired territory and carried along with it the institution of slavery is so irreconcilable with my comprehension, or any reason I possess, that I hardly know how to meet it."

This quotation is from Clay's great speech on the compromise measures. An examination of the immediate context will disclose the fact that Clay did not attack the question of the Constitution extending to the territories, but made his whole attack upon that branch of the proposition that held that it "*carried along with it the institution of slavery.*" If this was not clear from the context, if the learned Justice had read three columns more of the speech he would have Mr. Clay stating his position beyond all cavil, and against the Justice's contention. Mr. Clay said :—

"The government of the United States, therefore, possesses all the powers which Mexico possessed over those territories, and the government of the United States can do with reference to them, within, I admit, *certain limits of the Constitution*, whatever Mexico could have done. There are prohibitions upon the powers of Congress within the Constitution, which prohibitions, I admit, must apply to Congress *whenever* it legislates, whether for the old states or the *new territories*," . . . "but within the scope of those prohibitions, and none of them restrain the exercise of the power of Congress upon the subject of slavery, the powers of Congress are coextensive and coequal with the powers of Mexico prior to the cession."

This sounds like Mr. Justice Harlan's learned and patriotic opinion in the Downes case. Clay went further, and specifically referred to the District of Columbia, asserting with reference thereto "that Congress has all power which is not *prohibited by some provision* of the Constitution of the United States." It never occurred to him that Congress was unrestrained by the Constitution anywhere. I do not know that Mr. Clay has ever been charged with being a great constitutional lawyer, but common justice requires that his position when referred to on a great question like this should be stated with reasonable accuracy. It is not perceived how this triumvirate of statesmen give any material aid to the court. Perhaps it would on the whole have been

as well if the learned Justice had observed the correct maxim which he laid down early in the opinion: "The argument of individual legislators is no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts."

There is a line of cases relating to the territories and the District of Columbia,<sup>1</sup> as to some of which Mr. Chief Justice Fuller, in his very able and learned dissenting opinion, accurately says:—

"Many of the later cases were brought from territories over which Congress had professed to 'extend the Constitution,' or from the District after similar provision, but the decisions did not rest upon the view that the restrictions on Congress were self-imposed, and might be withdrawn at the pleasure of that body."

When I indorse this statement as accurate, I am not unmindful of the fact that Mr. Justice Brown states that, "In *American Publishing Co. v. Fisher*, 166 U. S. 464, a similar law providing for majority verdicts was put upon the express ground above stated, that the organic act of Utah extended the Constitution over that territory." The opinion in that case was by Mr. Justice Brewer; it is short, and I will quote all the court said on this point:—

"The territorial statute was relied upon as authority for this action. Its validity, therefore, must be determined. Whether the 7th Amendment to the Constitution of the United States, which provides that 'in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved,' operates *ex proprio vigore* to invalidate this statute, may be a matter of dispute.

"But if the 7th Amendment does not operate in and of itself to invalidate this territorial statute, then Congress has full control over the territories irrespective of any express constitutional limitations, and it has legislated in respect to this matter."

Now comes the statement of the "ground" upon which the case "was put":—

"Therefore, either the 7th Amendment to the Constitution, or *these*

<sup>1</sup> Some of which are: *Webster v. Reid*, 11 How. 437; *Reynolds v. United States*, 98 U. S. 154; *National Bank v. Yankton*, 101 U. S. 133; *The City of Panama*, 101 U. S. 453; *Callan v. Wilson*, 127 U. S. 550; *McAllister v. United States*, 141 U. S. 179; *Talbott v. Silver Bow Co.*, 139 U. S. 441; *American Publishing Co. v. Fisher*, 166 U. S. 464; *Springville v. Thomas*, 166 U. S. 707; *Bauman v. Ross*, 167 U. S. 548; *Thompson v. Utah*, 170 U. S. 343; *Capital Traction Co. v. Hof*, 174 U. S. 1.

*acts of Congress*, or all together, secured to every litigant in a common law action in the courts of the territory of Utah the right to a trial by jury, and nullified any act of its legislature which attempted to take from him anything which is of the substance of that right."

#### LEGISLATIVE CONSTRUCTION.

Practical construction by legislative acts is given great weight, especially by Mr. Justice White in reaching his conclusion. *Fairbanks v. United States*, decided at the same term, where the court held the stamp tax imposed on a foreign bill of lading to be equivalent to a duty on exports and therefore unconstitutional, is an illustration of the uncertainty of the application of this rule. There the "practical construction" was all one way, and began in 1787, sustaining the tax. The court, however, ignored this rule on the ground that it could be "relied upon only in cases of doubt." It will be seen how readily "practical construction" can be eliminated by this rule. Mr. Justice Brown and Mr. Justice Shiras gave it weight in the *Downes* case, and ignored it in the *Fairbanks* case. Whatever the practical legislative construction may have been in the exercise of absolutism hitherto, it must be borne in mind that all this legislation has been tentative, and temporary in its character and purpose, preliminary to a regularly organized constitutional government. In case of territories, with the exception perhaps of Alaska, it has always been in contemplation that they would in due time make states. It is perfectly conceivable that Congress, by reason of some supposed exigency incident to the formative period, might adopt temporary legislative expedients of doubtful constitutionality, which they never would think of applying as a permanent rule to conditions expected to continue indefinitely.

#### THIRTEENTH AMENDMENT.

A question of supposed constitutional construction requires attention. The Thirteenth Amendment to the Constitution reads:—

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The last clause of this section, "or any place subject to their jurisdiction," is thought to be pregnant with importance. The Attorney General thought it was "most remarkable and signifi-

cant." Mr. Justice Brown thinks it "is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union," and Mr. Justice White called attention "to the Thirteenth Amendment of the Constitution, which," he says, "to my mind seems to be conclusive," . . . and "Obviously this provision recognized that there may be places subject to the jurisdiction of the United States, but which are not incorporated into it, and are hence not within the United States in the completest sense of those words." The question here is what the fathers meant, when in 1787 they used certain language in the Constitution. I shall not stop to elaborate the proposition whether the fact that their children, in 1865, used certain language in connection with the same subject has any legitimate tendency to show what the fathers did or did not mean when they used certain other language seventy-eight years before. It is possible that logic may bridge that chasm, but I should think it doubtful.

It will do no harm to inquire what, if anything, the children meant by the use of this "significant" clause. I have examined the history of that amendment, and I beg to suggest with all due diffidence that *no significance whatever* was attached to its use by those who used it. This amendment was introduced by Hon. J. B. Henderson, then a Senator from Missouri and a slaveholder, on the 11th day of January, 1864, and referred to the Committee on the Judiciary, of which Lyman Trumbull was chairman. It then read:—

"Article I. Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States."

On the 10th day of February Mr. Trumbull reported it back from the Judiciary in its present form, making an oral report as follows:—

"The Committee on the Judiciary, to whom were referred various petitions from different parts of the country, praying for an amendment to the Constitution of the United States so as to incorporate a provision prohibiting slavery in all the States and Territories of the Union, and also a joint resolution (S. No. 16) proposing amendments to the Constitution of the United States, and a joint resolution (S. No. 24) to provide for submitting to the several States an amendment of the Constitution of the United States, instructed me to report back an amendment to the Senate of the joint resolution No. 16 in the way of a substitute. I will state that the amendment, as recommended by the Committee on the Judiciary, provides for submitting to the Legislatures of the several States a proposition to amend the Constitution of the United States so that

neither slavery nor involuntary servitude, except as a punishment for crime, whereof a party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction; and also that Congress shall have power to enforce this article by proper legislation. I desire to give notice to the Senate that I shall, at an early day, call for the consideration of this resolution."

No written report appears to have been made; S. No. 16 was the Henderson resolution. It will be observed that Trumbull's report gives no reason for the adding of this clause, and does not refer to it specifically as distinguished from any other clause. I have examined the debate, and not only was absolutely no significance attached to this clause, but I do not even find it referred to. The burden of the debate was whether slavery should be abolished, and practically no attention was paid to the terms of the amendment by which it was to be accomplished. Sumner, it is true, made some verbal criticisms, and suggested several amendments to perfect the language from his view, none of which were adopted. He did not, however, make any reference to this clause. The language of an amendment offered by him February 8, 1864, referred to, and adversely reported by, the Judiciary, negatives the idea that the reason suggested for the use of this clause existed. His amendment read:—

"Everywhere in the limits of the United States, and each State and Territory thereof, all persons are equal before the law, so that no person can hold another as a slave."

Here the words "and each State and Territory thereof" are clearly repeated by way of emphasis, and the fact that the word "territory" is used in the same clause, in the same manner, and for the same purpose as the word "state," makes it evident that a "territory" was as much understood to be within the United States as a "state," and that there was as much occasion for referring to one as to the other. Very few references were made to the amendment in debate. Mr. Harlan put this question: "Ought the Constitution of the United States to be so amended as to abolish slavery, or to prevent the existence of slavery in all the States of the Union?" Mr. Holman said: "You now propose to abolish slavery throughout the United States?" Mr. Thayer stated that the effect of the amendment would be "to prohibit slavery forever within the territory of the United States." Mr. Orth said, after quoting the amendment: "The effect of such amendment will be to prohibit slavery in these United States;" not a word as to a desire to reach territory beyond the limits of

the United States, or the necessity of this "remarkable" clause for that purpose.

Mr. Henderson is still living, vigorous in intellect, and a lawyer of experience and great ability, as well as a man of large affairs. I called his attention to the significance attached to this clause, asking him if he could give me anything from his personal recollection that would throw any light upon this "conclusive" incident. I find he was an intimate friend of Senator Trumbull. I have from him an exceedingly interesting letter, too long for quotation.<sup>1</sup> Among other things he says:—

"Whatever else these words may refer to, they surely were not intended to embrace or refer to the territories of the United States."

So far as anything that was said or done by those who were a part of this history, the clause was apparently used for the purpose suggested by Mr. Chief Justice Fuller in his dissenting opinion, "simply out of abundant caution." When it does not appear that a single individual during that time ever thought specially of, or attached the slightest significance to, this clause, is it not to the last degree improbable that any one of the millions that voted upon the amendment exercised any thought, or had any intention with reference thereto? Yet Mr. Justice Brown suggests that: "Not only did the people in adopting the Thirteenth Amendment thus recognize a distinction between the United States and 'any place subject to their jurisdiction,'" as though the people had intelligently and purposely passed upon this question and significantly imbedded it in their fundamental law. How can this amendment add anything to the discussion? Still we must concede that much depends upon the point of view. These opinions illustrate this. Mr. Justice Brown says:—

"The decisions of this court upon the subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. [It would be instructive to have these pointed out.] Other cases arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States."

Mr. Justice White says:—

"Let me now proceed to show that the decisions of this court, without a single exception, are absolutely in accord with the true rule as evolved

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<sup>1</sup> The letter is printed at the end of this article.

from a correct construction of the Constitution as a matter of first impression and as shown by the history of the government which has been previously epitomized."

"How shall we find the concord of this discord?"

#### THE CONSEQUENCES INVOLVED.

With the greatest respect for the court, I feel bound to say that it seems to me that the majority justices were too profoundly impressed with the supposed consequences of an adverse decision.

In Mr. Justice McKenna's view, it took "this great country out of the world and shuts it up within itself." Mr. Justice Brown thought: "If such be their status [citizens] the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States. . . . Such requirement would bring them at once within our internal revenue system . . . and applying it to territories which have had no experience of this kind, and where it would prove an intolerable burden. . . . Our internal revenue laws, if applied in that island, would prove oppressive and ruinous to many people and interests. . . . A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire," and "the question at once arises whether large concessions ought not to be made." And Mr. Justice White thought that if incorporated, "it resulted that the millions of people to whom that treaty related, were, without the consent of the American people, as expressed by Congress, and without any hope of relief, indissolubly made a part of our common country."

What are the direful consequences that inhere in the application of all of the provisions of the Constitution to the territories? I can understand how sugar and tobacco planters, and raisers of tropical fruits, can see "serious" consequences in conditions that might compel them by competition to reduce the price of their goods to the consumer, and hence the importance of being able to discriminate against such competitors. Such consequences, however, would not necessarily be very "serious" to the great mass of our people.

Inasmuch as voting and representation are not elements, what other consequences are there that should be guarded against with such zeal? Is it the competition of cheap labor? We have eman-

cipated millions in our own land without disturbing labor conditions. There were those who thought that upon emancipation "a torrent of black emigration would set forth from the South to the North;" "one of the first results of its emigration would be a depreciation in the price of labor. The added number of laborers would, of itself, occasion this fall of prices, but the limited wants of the negro, which enable him to underwork the white laborer, would tend still further to produce this result. The honest white poor of the North would, therefore, be either thrown out of employment entirely by the black, or forced to descend to an equality with the negro, and work at his reduced prices."

None of these woes have vexed us. The negro cannot be driven out of the South. He has as yet made no injurious competitive industrial development here, surrounded by vast natural resources, and the Filipino is ten thousand miles away. He is vastly the superior of the Filipino physically, and until the Philippines produce a Fred Douglas or a Booker T. Washington, he has nothing to fear in an intellectual comparison. The temporary inconvenience of internal revenue laws seems to me vastly overestimated. Mere inconvenience can hardly determine a constitutional question.

Where is the bugbear? Is citizenship really "extremely serious"? If so, in what particular, and how? The Foraker bill when first reported from the committee contained a provision making the inhabitants of Porto Rico "citizens of the United States." The committee did not seem to be impressed with the "serious" character of that act. They said in their report:—

"The committee have seen fit, by the provisions of this bill, to make them citizens of the United States, not because of any supposed constitutional compulsion, but solely because, in the opinion of the committee, having due regard to the best interests of all concerned, it is deemed *wise* and *safe* to make such a provision."

Again:—

"It was necessary to give these people some definite status. They must be either citizens, aliens, or subjects. We have no subjects, and should not make aliens of our own. It followed that they should be made citizens, as the bill provides."

If, for any reason, the committee had thought it unwise or unsafe, they might have withheld that quality. Apparently we now have "subjects." As to dangers, the court seems to have become possessed of light which was denied to the committee. The committee studied the practical conditions, and it seemed to them



"wise and safe." What has happened to make it so "serious"? Should we not have a specification of the dangers that inhere in giving to "our own" the same civil rights under the Constitution that we possess?

Such are a few of the considerations tending to show that the profession and the country may not feel like unreservedly acquiescing in this decision. The foundation upon which it rests is too insecure to insure permanence. As the needle always turns to the pole, may we not hope that the greatest court in Christendom will in the end determine the law of the land in accordance with correct principles. With such an unerring guide the Republic will achieve its splendid destiny, "conquering and to conquer," enlarging its borders, disseminating the blessing of its civilization, and fulfilling the mission of Him who "hath made of one blood all nations of men, for to dwell on the face of the earth."

*Charles E. Littlefield.*

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WASHINGTON, D. C., June 28, 1901.

HON. C. E. LITTLEFIELD, ROCKLAND, ME.

*My Dear Sir,* — In reply to yours of the 22d instant, I can give you but little beyond the bare impressions left on my mind by events which occurred over thirty-seven years ago. I am just starting to Bar Harbor for the summer; and I am therefore unable to make the examination of Congressional records and other data necessary for a more satisfactory answer to your questions.

The joint resolution to amend the Constitution abolishing slavery, which afterwards became the 13th amendment, was presented by me on January 11, 1864, and at once referred to the Judiciary Committee of the Senate. The resolution as submitted consisted of two articles, the first of which was intended to abolish slavery throughout the United States, and the second was designed to facilitate or make less difficult, the process of amending the Constitution.

The first article as introduced by me was in these words:—

"ARTICLE I. Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States."

On the 10th of February following, the Committee, through its chairman, Mr. Trumbull, reported back the joint resolution, omitting entirely the 2d article, and amending the 1st article to read as follows:—

"SECTION I. Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SEC. II. Congress shall have power to enforce this article by appropriate legislation."

My remembrance is that Mr. Trumbull, and possibly some other members of the Judiciary Committee, while the resolution was before them, indicated to me a desire or purpose to conform the language of the amendment as far as possible to that of the 6th article of the Ordinance of 1787 for the government of the Northwest Territory, which, as you will remember, is in the following words:—

“ARTICLE VI. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted.”

As slavery was not supposed to exist at all in the Northwest Territory in 1787, the Congress of the Confederation used language, not to abolish slavery, but to prevent its future introduction, to wit, “there *shall* be neither slavery nor involuntary servitude,” etc. That slavery existed as a matter of right or of law in the United States in 1864 was disputed by some members of Congress. But that it existed as a matter of fact was hardly to be disputed by anybody. I assume that the Judiciary Committee recognized the actual existence of slavery, and their purpose was to use language proper to terminate its existence on the adoption of the amendment. The change in phraseology is slight, but indicative of the purpose. The language used is, “neither slavery nor involuntary servitude . . . shall *exist* within the United States,” etc. In other words, as slavery did *not* exist in the Northwest Territory in 1787, it was enough to say “there shall be” none there in the future. But as slavery *did* exist in the United States in 1864, it was declared that, upon adoption of the amendment, it should no longer exist.

In this desire to conform to the phraseology of the Ordinance of 1787, it followed, of course, that the words, “whereof the party shall have been duly convicted,” were inserted. To this change, I, of course, made no objection. If it introduced anything new into the amendment, the new matter was in no way objectionable. If it added nothing of substance to my original resolution, it detracted nothing, and possibly made it less liable to misinterpretation. While clearness of expression is desirable in the framing of laws, brevity is equally desirable provided the language used comprehends the purpose sought. It never entered into my mind, however, that “punishment for crime,” under our system of government, could be decreed by any authority other than the duly constituted tribunals of justice.

But the amendment to which you call my special attention is found in the words, “or any place subject to their jurisdiction.”

After providing that “neither slavery nor involuntary servitude shall exist in the United States,” you properly ask why it was thought necessary to add the words, “or any place subject to their jurisdiction.” And in this connection you call my attention to the comments of Justices Brown and White of the Supreme Court in their late opinions in the Porto Rico cases.

The reasoning of these eminent judges is clearly defective, and the difficulties of construction suggested by them would have disappeared with a better knowledge of the history of the amendment and the peculiar circumstances attending its adoption.

Whatever else these words may refer to, they surely were not intended to embrace or refer to the territories of the United States. If the eminent lawyers who composed the Judiciary Committee at that time had intended such a meaning, the term "territory" or "territories" would have been expressly used. It is the language of the original constitution. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the 'territory, or other property,' " etc. The word "territory" had a clear and well-defined meaning before the Federal Constitution was framed. It was constantly used and well understood under the old Confederation of states. The United States inherited "territories ;" and the new government accepted the nomenclature attached to them as the convention had crystallized it in the Constitution. It is a term whose definition is as distinctive as any other term or phrase used in that instrument.

In providing for a capital or seat of government, the land to be acquired for that purpose was not called a "territory." It was named a "district ;" and that title inheres in all our laws. The sites to be obtained for "forts, magazines, arsenals, dockyards and other needful buildings" were not designated as "territories." They were called "places." And as these places were to belong to the United States, they would necessarily be "subject to their jurisdiction." And in this connection, you will mark the fact that the Judiciary Committee, in framing the constitutional amendment of 1864, used the word "place" — the precise word already used in the Constitution to designate those districts or tracts of land, other than territories, belonging to the United States.

In 1864, let it be remembered, the members of Congress who were called to act on this amendment were fresh from the work of laying taxes of every character — "taxes, duties, imposts, and excises." The whole gamut of taxation, as known to the Constitution, was quite familiar to them all ; and it was accepted by all that tax laws, by virtue of general enactment, applied to "territories" as well as states. How could it be otherwise, when each member knew and properly respected the old and revered decision in the *Loughborough-Blake* case, which had long before defined the term "United States" ? That court, through its Chief Justice, had said : "It is the name given to our great Republic which is composed of states and territories. The District of Columbia, or the territories west of the Missouri, is not less within the United States than Maryland or Pennsylvania."

If we examine contemporaneous history, we find the nation involved at that time in a war of gigantic proportions — blockade runners hovering about our Southern coasts with privileges of shelter in the islands

of the Gulf, and privateers despoiling our commerce, carrying commissions of the Confederate states and carrying, too, the sympathy of European governments.

Among the officers of our army and navy the demand for naval and coaling stations outside the United States and nearer to the rendezvous of these enemies of our national success, was not only general but urgent. The necessity for such stations was equally recognized by the statesmen of the period. So strong was this feeling that Admiral Meade, a short time after, assumed the authority to contract with a Samoan chief for the harbor of Pago Pago; and General Grant, as President, with similar purpose, opened negotiations for island sites in the Gulf of Mexico. In contemplation of such stations, the language of the amendment becomes not only appropriate but necessary. They might be obtained in slaveholding territory. If so, no compact in the covenants of purchase or lease should be allowed to perpetuate the institution. In the language of the Constitution, as it then stood, such stations would not be designated as "territories" but "places." And this latter word was the term naturally to be selected by such lawyers as Trumbull of Illinois, Harris of New York, Howard of Michigan, Foster of Connecticut, and Ten Eyck of New Jersey.

I come now to another view of the subject, then fully realized and felt by all, but not openly discussed by any. I mean the ever-constant fear that after all our sacrifices, foreign intervention or other contingencies might compel either a final separation of the states or a peace on terms looking to the continuance of slavery in some of its forms. With the more pronounced anti-slavery men (especially those of the old Abolition party), the fear of this latter contingency was more dreadful, if possible, than that of dissolution or permanent separation. Among these men there was want of confidence, more or less, in Mr. Lincoln himself. He had already said that he would favor whatever made for the Union. If the Union could be preserved by abolishing slavery, he would destroy slavery. If the Union could only be preserved by retaining slavery, he would accept the hard condition and save the Union.

To statesmen like Mr. Sumner, this was gall and wormwood. They were peculiarly alive to the possibilities of the future. The seceding states might be taken back with their original institutions untouched. If so, the old strife would continue. The roots of dissension would again grow into rebellion and war. These states might possibly be left in a Confederacy to themselves, but in some way subject to a modified jurisdiction of the United States—such as the Balkan states under Turkey, such as the South African Republics under Great Britain, or Cuba under the Platt Resolutions.

It was then universally conceded that if slavery could be once abolished by constitutional provision, it could not be revived by treaties of peace. The Constitution was then supposed to be superior to treaties and laws.

The nation had not then outgrown its own organic law. A treaty in violation of the Constitution would have been denounced even by laymen, as null and void. The Republic in its swelling pride of greatness had not accepted the doctrine that the thing created may be greater than the creator, or that two or more departments of the government might set aside the instrument under which they have their being. But if slavery were securely abolished by constitutional provision, it was believed that its continuance could not be accepted as a condition of peace.

When this amendment was drafted General Grant had not commenced the great campaign against Richmond (he had not even been selected for the work), and General Sherman had not reached Atlanta nor organized his march to the sea. No man could prophesy the end. But whatever else might result, a majority of Union men had reached the hope and purpose that there should be an end of slavery. Perhaps to this intense desire, however crude and imperfect his phraseology, may be attributed the joint resolution of Mr. Sumner, on this subject, introduced into the Senate on February 8, 1864, and afterwards pressed by him as a substitute for the Committee's report. It provided as follows: "Everywhere in the limits of the United States, and of each state and territory thereof, all persons are equal before the law, so that no person can hold another as a slave." If this resolution had become a part of the Constitution, those honorable judges who were puzzled by the language of the 13th amendment as it stands, would have been led into inextricable confusion, in an effort to account for the word "states," after the whole area of the United States had been provided for.

In view of the facts referred to, it is fair to presume the Committee concluded that the words "United States" embraced all the states admitted into the Union and all the territories belonging to the government; and that the phrase "any place subject to their jurisdiction" covered the District of Columbia, the forts, arsenals, dockyards, naval and coaling stations, together with any territory then within the seceded states over which any jurisdiction or authority might result from treaties of peace at the conclusion of the then pending war.

Yours very truly,

J. B. HENDERSON.

# HARVARD LAW REVIEW.

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THE LAW SCHOOL. — The following table shows the registration in the School on November 15 for the last twelve years: —

	1890-91.	1891-92.	1892-93.	1893-94.	1894-95.	1895-96.
Res. Grad. . . . .	—	—	—	—	—	—
Third year . . . . .	44	48	69	66	82	96
Second year . . . . .	73	112	119	122	135	138
First year . . . . .	101	142	135	140	172	224
Specials . . . . .	61	61	71	23	13	9
Total . . . . .	279	363	394	351	402	467

	1896-97.	1897-98.	1898-99.	1899-1900.	1900-01.	1901-02.
Res. Grad. . . . .	—	1	1	—	1	1
Third year . . . . .	93	130	102	134	144	149
Second year . . . . .	179	157	169	193	202	190
First year . . . . .	169	216	218	232	241	229
Specials . . . . .	31	41	58	51	58	59
Total . . . . .	472	545	548	610	646	628

For the first time in several years the figures show a slight decrease in the total registration, in the numbers of the first and second year students, and in the relative per cent. of those returning to the second and third year classes. This decrease is largely due to the stricter requirements for admission and to the rule that a student who fails to pass in two courses cannot return.

The following are the usual tables showing the sources from which twelve successive classes have been drawn, both as to previous college training and as to the geographical districts from which they have come: —

## HARVARD GRADUATES,

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1893	34	1	19	54
1894	30	2	17	49
1895	32	4	13	49
1896	23	7	17	47
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69

## GRADUATES OF OTHER COLLEGES,

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1893	5	9	21	35
1894	7	20	38	65
1895	8	14	30	52
1896	14	11	45	70
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	107
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128

## HOLDING NO DEGREE,

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1893	4	1	7	12	101
1894	20	1	10	31	142
1895	16	3	14	33	135
1896	10	4	9	23	140
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	240
1904	22	—	10	32	229

The thirty-two men in the first year class holding no degree are Harvard seniors who in each instance however have completed the work required for the Harvard A. B. degree. Thus it may be said that all the members of the first year class are virtually college graduates. The same is true of nearly 99 per cent. of all the members of the School, since, other than Harvard seniors, seven special students are the only men in the School who have not received a degree. Of the fifty-nine special students twenty-six are here for the first time this year, and of these twenty-five are college or university graduates, five having received the LL. B. degree.

There are now in the School graduates of ninety-two colleges and universities, as compared with eighty-two last year and seventy-six the year preceding. In the present first year class forty-four colleges and universities, as compared with forty-seven last year, are represented as follows: Harvard, 69; Yale, 25; Brown, 19; Dartmouth, 11; Williams, 6; Bowdoin, Chicago, 5; Amherst, California, Tufts, 4; Northwestern, Wisconsin, 3; Centre, Cincinnati, Cornell, Georgetown University, Iowa, Minnesota, Princeton, Vermont, Washington and Jefferson, Western Reserve, 2; Bethany, Central, Colorado, University of Colorado, Earlham, Franklin and Marshall, Gates, Georgetown, Haverford, Illinois Wesleyan, Indiana, Leland Stanford, Jr., McGill, Michigan, Mt. Vernon, Ohio State, University of Pennsylvania, Pomona, St. Joseph's, Syracuse, Tulane, Vanderbilt, 1. There are at present in the School thirteen Law School graduates, of whom seven have received both academic and law degrees, representing the following twelve Law Schools: Buffalo, Centre, Cincinnati, Georgetown University, Harvard, Iowa (2), Indiana, Missouri, Northwestern, Texas, and Western Reserve.

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**RECOVERY FOR DAMAGE RESULTING FROM NERVOUS SHOCK.**—It is interesting to note the trend of judicial opinion on the question of allowing recovery for injuries resulting from nervous shock. There is little discussion where the defendant acts wilfully, but where his act is merely negligent, the courts have adopted widely dissimilar views. In New York, Massachusetts, and the English Privy Council the right to recover has been denied. *Mitchell v. Rochester Ry.*, 151 N. Y. 107; *Spade v. Lynn, etc.*, R. R., 172 Mass. 488; *Victorian Ry. v. Coultas, L. R.*, 13 App. Cas. 222. In South Carolina, Minnesota, and Ireland strong decisions have been rendered in the plaintiff's favor. *Mack v. South, etc., R. R.*, 52 S. C. 323; *Purcell v. St. Paul, etc., Ry.*, 48 Minn. 134; *Bell v. Great, etc., Ry.*, 26 L. R. Ire. 428. In a recent English case the defendant's servant negligently drove a van through the window of the room in which the plaintiff was sitting. There was no physical contact, but the court allowed an action, as the plaintiff's fright was such as to cause a miscarriage two months later. *Dulieu v. White*, 1901, 2 K. B. 669.

The opinion of Kennedy, J., compact and forceful, goes far towards overcoming the objections upon which the contrary decisions are founded. The statement that there is no general duty of care not to frighten others, he argues, is too broad. There is a duty not to injure others. The only question is whether there is an actionable breach of such duty if one is made ill in body by negligence which does not break his ribs, but shocks his nerves. In answer to the objection that as fright is not actionable so no consequence of fright can be, he quotes Sir Frederick Pollock, that "Fear taken alone falls short of being actual damage, . . . because it can be proved and measured only by physical effects," and where measurable damage does result, it is evident that its primary cause was the act which produced the fear, not the fear itself. On the question of remoteness Kennedy disagrees with the Coultas decision. He asserts that if the injury follows the shock as its direct and natural effect, even though not immediate in point of time, it is still a proximate consequence of the shock. The grounds of public policy are lastly examined, and dismissed as insufficient to bar the plaintiff in meritorious



cases, and as involving an unwarranted distrust in the capacity of legal tribunals to get at the truth.

The courts as a rule do not expressly recognize that the ultimate question in such cases is one of expediency, but base their decisions on other grounds. A distinction has apparently been drawn between external effects of shock and those purely internal. Thus if the plaintiff faints the ensuing damage is too remote. *Victorian Ry. v. Coultas*, *supra*. Yet if external injury is sustained in jumping off a coach he may recover. *Jones v. Boyce*, 1 Stark. 493. If his horse bursts a blood vessel and dies the owner can get no compensation. *Lee v. Burlington*, 85 N. W. Rep. 618. But if it runs away the owner is recompensed for resulting damage. *Wilkins v. Day, L. R.*, 12 Q. B. D. 110. This is not a sound distinction. All organs, internal and external, nervous and muscular, are equally physical, and should be equally protected by the law; and the psychological fact should be recognized that a manifestation of fear through the nervous system is as proximate an effect as a manifestation through the muscular system.

Granting that logically physical damage is often the direct result of nervous shock, though not contemporaneous with it, the question still remains, is it wise to permit recovery without proof of impact or of immediate palpable injury? The objection that the practical application of the rule would be difficult is hardly convincing. It is not easy to translate any personal injury into terms of dollars and cents, yet courts and juries are doing it every day. The argument *ab inconvenienti* therefore is not insurmountable, and also it must be remembered that the plaintiff has not only to claim that he has suffered, but to prove it. It is urged by many that the courts would be flooded if such claims were allowed; and that three fourths of the claims would be fraudulent. Probably litigation would increase: possibly it should. Still, the threatened flood has not yet overtaken those courts which have granted relief. The principal case is a decided addition to the controversy both as a strong decision and for its sound logic. See 10 HARVARD LAW REVIEW, 387; 52 Cent. L. J. 339.

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EASEMENTS OF LIGHT AND AIR OVER STREETS.—Much less favor has been extended to easements of light and air by the courts of this country than by those of England. It is everywhere held that the doctrine of ancient lights is not suited to the conditions of a growing country, and never became part of our common law. *Myers v. Gemmel*, 10 Barb. 537. Upon similar grounds some courts have declined to follow the English doctrine of acquiring easements of light and air by implied grant. *Keats v. Hugo*, 115 Mass. 204; *Fanes v. Jenkins*, 34 Md. 1, *contra*. Even if such a doctrine is accepted, the better opinion is that its application should be limited to cases where the easement is strictly necessary to the beneficial user of the estate granted. *Turner v. Thompson*, 58 Ga. 268. In regard to the rights of light and air over a highway, however, an exception is to be noted. A recent Maryland decision in enjoining the construction of an arch over a public street at the instance of one whose building would thereby have been darkened adopts the view that abutting landowners have an easement of light and air over a public highway. *Townsend v. Epstein*, 49 Atl. Rep. 629. This right in several jurisdictions is held to exist independently of the ownership of the

fee of the highway, and to constitute property within the meaning of the constitution. *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122; *Adams v. Chicago, etc., R. R. Co.*, 39 Minn. 286; *Garrett v. Lake Roland, etc., Co.*, 79 Md. 277, *contra*. It is said to arise even though the highway is established after the grant of the abutting property, *Barnett v. Johnson*, 15 N. J. Eq. 481; and not to extend over private ways. *Dexter v. Tree*, 117 Ill. 532. While it is undoubtedly desirable in closely settled communities that abutters should have an easement of light and air over the highway, it is not entirely clear from what source the easement is to be traced. It has been suggested that it is an implied easement appurtenant to the land arising by virtue of an implied agreement that if the lot be purchased the owner shall be entitled to the open space above the street. The difficulty with this suggestion is that it in no way explains the acquisition of an easement when the establishment of the highway is subsequent to the grant of the abutting property, nor the limitation of the doctrine to land upon public, as distinguished from private highways. A consideration of the objects and incidents of the creation of public highways may place the matter in a clearer light than an attempt to argue from the analogy of easements over private land. A public highway is established to facilitate intercourse between the public at large and the abutting landowners, an object best effected by permitting the public to pass freely over the road, and by enabling the abutters to build to its edge. As the abutters require an easement of light and air if they build to the edge of the highway, such an easement would seem as essential to the general purposes of the highway as that of public travel. Both easements, therefore, should be regarded as natural incidents to the creation of the highway, arising simultaneously and by virtue of their relation to the objects of that creation. Cf. *Adams v. Chicago, etc., R. R. Co.*, 39 Minn. 286. Such a view will at least support the desirable results that have been reached, without doing violence to well-settled principles of the law of property.

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ANTICIPATORY BREACH OF CONTRACT AS EXCUSE FOR NON-PERFORMANCE. — The usual statement of the doctrine of anticipatory breach is to the effect, that when one party to an executory bilateral contract expresses an intention not to perform, the other party may treat the contract as broken and sue at once, or may ignore the repudiation, in which case the obligations upon each continue effective. *Frost v. Knight*, L. R. 7 Ex. 111. Illogical as it is to make a breach of contract depend on the promisee's election, considerations of convenience furnish perhaps a justification. At least so much of the doctrine of anticipatory breach as gives the right to sue immediately, is firmly established. *Roehm v. Horst*, 178 U. S. 1; 14 HARVARD LAW REVIEW, 433, note 4. But the alternative proposition, that the repudiation if not immediately acted upon is inoperative, has received almost no direct adjudication, although usually asserted as *dictum* where the right to sue immediately is recognized. In a recent case, however, the Supreme Court of Georgia treating the rule as established by these *dicta* decides that a repudiation by the plaintiff is no excuse for a subsequent non-performance by the defendant, when it is not shown that the defendant has elected to treat the contract as broken by the repudiation. *Smith v. Ga. Loan, etc., Co.*, 39 S. E. Rep. 410. One other direct decision where the point was raised in a

slightly different way is in harmony. *Dalrymple v. Scott*, 19 Ont. App. 477.

A doctrine resulting in such decisions as these is objectionable. The principle of fairness, introduced under the terms of implied conditions, excusing one party from performance on the *actual* failure of the counter-performance, applies with equal force when it appears that there is *going to be* such failure. *Ripley v. M'Clure*, 4 Exch. 345; *Lowe v. Harwood*, 139 Mass. 133. There is also the well-recognized rule that forbids a plaintiff increasing the damages by a useless performance after the defendant has expressed his intention not to carry out the contract. *Clark v. Marsiglia*, 1 Denio, 317; *Chicago, etc., Co. v. Barry*, 52 S. W. Rep. 451 (Tenn.). These considerations of fairness are not only in evident conflict with the doctrine of the principal case, but they are in accord with the commercial understanding. Where one party repudiates the contract, no course is more natural than for the other to remain passive, either hoping for a future fulfilment of the agreement, or looking for an opportunity to contract elsewhere. This passivity ought not to render the repudiation, if it still continues, inoperative as a defence. Such a course is also advantageous to the one who repudiates, as he may retract his repudiation, unless it has been acted upon. *Nilson v. Morse*, 52 Wis. 240. A further difficulty is that courts leave us quite in the dark as to what act, if any, other than immediately bringing suit, will be sufficient to render the repudiation operative. It would seem wise, therefore, not to extend the doctrine of anticipatory breach beyond its first proposition, the immediate right to sue. If the injured party elects not to sue at once, the ordinary rules of contract should govern, and the repudiation should be an excuse for his subsequent non-performance. It is therefore unfortunate that Lord Cockburn's suggestion of compelling the defendant to sue at once or to continue to perform should have been recently strengthened by an actual decision.

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VALIDITY OF SPECIAL ASSESSMENTS UNDER THE FOURTEENTH AMENDMENT. — It was thought by many that a deathblow had been dealt to the "front foot rule" by the Supreme Court in the important case of *Norwood v. Baker*, 172 U. S. 269. The court asserted that the exaction of an assessment in substantial excess of the special benefits was, to the extent of such excess, a taking of property without compensation, and was supposed to have decided in consequence, that a rule of apportionment which does not provide for an inquiry into special benefits is in violation of the Fourteenth Amendment. This interpretation of the decision is vigorously maintained by Mr. Justice Harlan in the dissenting opinion of a subsequent case. The majority of the court, however, while professing not to overrule *Norwood v. Baker*, seem to justify it on its peculiar facts, and in upholding the validity of the "front foot rule" to repudiate its supposed doctrine. *French v. Barber, etc., Co.*, 181 U. S. 324. A recent case is interesting as recognizing that this modification leaves little of the doctrine. *Zehnder v. Barber, etc., Co.*, 108 Fed. Rep. 570 (Cir. Ct. Ky.). In this case, a temporary injunction, which had been granted on the authority of *Norwood v. Baker*, was dissolved in conformity with *French v. Barber, etc., Co.*

An historic clause like the Fourteenth Amendment should be con-

strued in the light of the law existing at the time of its adoption. *Murray's Lessee v. Hoboken, etc., Co.*, 18 How. 272; *Mattox v. U. S.* 156 U. S. 237. Construed thus, "due process of law" seems to mean the same as "the law of the land" in Magna Charta, and to have no reference to taxation. It was intended to secure ancient guaranties, not to establish new ones. The safeguard against unjust taxation was supposed to be the representative system. It is probably true as a matter of the theory of taxation that the basis of special assessments is special benefit. 2 Dillon, *Mun. Cor.*, 4 ed., § 761. But the taxing power is a legislative power, and belongs to the state legislatures except as to objects forbidden by the Constitution. Included in the taxing power is the power of apportionment. It is for the legislature to weigh the benefits and burdens and the other considerations which enter into any plan of apportionment. *People v. Brooklyn*, 4 N. Y. 419. Consequently, so long as there is what can be called a real exercise of the taxing power the Fourteenth Amendment is not violated. It is only where it is a mere pretence and subterfuge that there can be said to be any ground for the interference of the Supreme Court. The Fourteenth Amendment has no applicability to the expediency or justice of the tax, nor to the question of its equality. *Kelly v. Pittsburgh*, 104 U. S. 78. Equality is sometimes a requisite under state constitutions, but the United States Constitution has no such requirement in regard to state taxation, and cases dealing with this phase of the question are to be carefully distinguished. See *Chicago v. Larned*, 34 Ill. 203. It is to be noticed also that, unless some adequate distinction be drawn between special assessments and general *ad valorem* taxation, the latter would seem to be covered by the proposition in *Norwood v. Baker*, *supra*, which obviously could not have been intended. If by "special assessment" be meant a tax on less than a political subdivision, the states by exercising their undoubted power of changing their political subdivisions could convert a special assessment into a general tax. 14 HARVARD LAW REVIEW, 1, 98. The court in *Norwood v. Baker* seems to have proceeded upon a too narrow view of the Constitution. The decision in *French v. Barber, etc., Co.*, *supra*, approved in the principal case is not only sounder in principle, but seems to be supported by the current of decision in the Supreme Court prior to *Norwood v. Baker*. *Davidson v. New Orleans*, 96 U. S. 97; *Spencer v. Merchant*, 125 U. S. 345; *Walston v. Nevin*, 128 U. S. 578. Moreover the result seems eminently desirable in view of the prevalence and long standing of the "front foot rule," and further agitation of the question can only result in confusion and practical difficulties.

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THE ADMISSIBILITY OF TESTIMONY GIVEN BEFORE A GRAND JURY. — A witness makes self-criminating statements before a grand jury, although warned of his privilege. Subsequently he is accused and brought to trial. The question whether or not his previous testimony can be admitted is raised in a recent Texas case, the court holding such testimony admissible. *Wisdom v. State*, 61 S. W. Rep. 926 (Tex. Cr. App.). The decision is based entirely upon the ground that a grand juror is competent to testify to such statements, since he does not thereby violate the secrets of the jury room. This proposition, though apparently well settled, is not conclusive on the question in issue. *Commonwealth v. Mead*, 12 Gray, 167.

Two objections not always carefully distinguished are urged against the admissibility of such evidence. The first is that a confession before the grand jury is inadmissible because involuntary. *People v. McMahon*, 15 N. Y. 384. Generally, however, testimony of this kind involves an admission, not a confession; for the latter requires an acknowledgment of guilt. 1 Greenl. Ev. § 170. As an admission is not excluded because involuntary, the objection therefore is seldom in fact applicable. *State v. Broughton*, 7 Ired. 96. Nevertheless, many cases consider the testimony as an involuntary confession. According to the best authority a confession is excluded as involuntary only when it is obtained by promises or threats in regard to the case itself made by one in authority. Joy Confessions, § 1; *Hopt v. Utah*, 110 U. S. 574, 585. A statement under oath before the grand jury, even if a confession, is not as a rule involuntary, because it is seldom induced by such promises or threats. *Commonwealth v. King*, 8 Gray 501. Consequently in general, the objection that the testimony is inadmissible as an involuntary confession fails. The second objection is that the accused in violation of his constitutional privilege is obliged to furnish evidence against himself; for when he is before the grand jury he must either testify, or, by exercising his privilege not to criminate himself, furnish an admission by conduct. But according to the weight of authority the prosecution should not be allowed to prove a reliance on privilege, for otherwise the privilege is partially defeated. *National, etc., Bank v. Lawrence*, 77 Minn. 282. Even in jurisdictions where the exercise of the privilege can be shown, it would seem that this constitutional right is not violated by admitting the testimony given before the grand jury. For, although the accused is placed where he cannot escape the drawing of an inference from his silence, nevertheless the constitutional provision by its terms seems to apply only to direct testimony, and the accused is not forced to give direct testimony incriminating himself. Cf. *State v. Bartlett*, 55 Me. 200, 216.

It seems then as if legally such testimony should be received. Joy Confessions, § VIII. Its exclusion may however be supported as a rule of policy, on grounds of merciful administration. The prosecutor should not be allowed to put a man, not at the time accused, on the rack, and use at the trial what he has extorted. A reasonable rule would be to exclude testimony given before the grand jury unless the witness spoke voluntarily with the understanding that if he chose to remain silent, that fact should not be subsequently brought against him. Such a rule it seems would effect a desirable result, often reached by the courts however on erroneous grounds.

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**TELEPHONE AND TELEGRAPH COMPANIES AS COMMON CARRIERS.**—Whatever may be the scientific distinction between the telephone and telegraph as inventions, it is well settled that the legal status of companies organized for the purpose of transmitting intelligence by their means is the same. *Attorney-General v. Edison Telephone Co.*, 6 Q. B. Div. 244. Both may take by eminent domain under proper legislative sanction. *Turnpike Co. v. News Co.*, 43 N. J. L. 381; *York Telephone Co. v. Keesey*, 5 Pa. Dist. Rep. 366. Both may make reasonable rules and stipulations for the conduct of their business. *Western Union Tele-*

*graph Co. v. Van Cleave*, 54 S. W. 827 (Ky.); *Pugh v. City, etc., Telephone Co.*, 9 Cincinnati Weekly Bul. 104. Both are subject to legislative control as to rates and regulations. *State v. Western Union Telegraph Co.*, 113 N. C. 213; *Hockett v. State*, 105 Ind. 250. In a recent South Carolina decision it is said that telephone companies are under a duty at common law to furnish facilities to the public without discrimination, and this obligation is placed upon the ground that they are in one sense of the term common carriers. *State v. Citizens' Telephone Co.*, 39 S. E. Rep. 257. The tendency to rest the legal status of telegraph and telephone companies upon the similarity of their undertaking to that of the common carrier is unfortunate as ignoring broad principles of law that determine the rights and duties of both callings. The common carrier is only one of a class of public servants endowed by the common law with special privileges and subject to special obligations by reason of the public interest in the proper conduct of the business undertaken. This class anciently included innkeepers, smiths, farriers, tailors, carriers, and others. See 11 HARVARD LAW REVIEW, 163. With the progress of civilization and the development of new countries the number of public employments increased. It was the province of the courts to determine what was a public occupation, and the decisions naturally varied with the conditions and interests of the localities in which they were rendered. *Lake Koen Navigation, etc., Co. v. Klein*, 65 Pac. Rep. 684 (Kan.). Among the undertakings that have been held to be public in this country may be mentioned the supplying of water, gas, electricity, and news, and the operating of grain-elevators, grist-mills, telegraphs, and telephones. It is characteristic of persons or corporations engaged in a public occupation that they may take by eminent domain; that they are subject to the control of the legislature in many ways unknown to ordinary business corporations; and that they must serve the public at reasonable rates and without unfair discrimination. *Olmsted v. Proprietors of the Morris Aqueduct*, 47 N. J. L. 311. The common carrier in addition to the general privileges and obligations of public servants is under an absolute liability, except for the act of God or public enemy, for the safe delivery of goods intrusted. *Chevallier v. Straham*, 2 Tex. 115. It has been pointed out that this so-called insurer's liability of the common carrier is peculiar to him, and is to be traced to an accidental development of the common law rather than to the nature of his occupation. 11 HARVARD LAW REVIEW, 158-168. While the carrying of messages by electricity bears a striking similarity to the undertaking of the common carrier, it lacks one feature without which the insurer's liability of the latter would never have arisen, namely, a bailment of the thing to be conveyed. It is accordingly well settled that telegraph companies are not under the insurer's liability of common carriers. *Grinnell v. Western Union Telegraph Co.*, 113 Mass. 299. It seems preferable therefore to rest the status of telegraph and telephone companies upon the public nature of their occupations rather than upon the theory that they are common carriers, a theory not borne out by the decisions and based upon an analogy in one respect at least defective.

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THE TAFF VALE RAILWAY CASE. — A recent decision of the House of Lords immediately involving the legal status of English trade unions

and incidentally the liability of all unincorporated associations has excited unusual interest in both England and the United States. *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426. The plaintiff company's property having been illegally picketed by agents of the defendant society—a registered trade union—an interim injunction against the agents personally and against the society in its registered name was granted by Farwell, J. An application of the society to have its name stricken out was dismissed. The only point argued here or in the higher courts was the amenability of the union to an injunction in its registered name. This decision, reversed in the Court of Appeal, was restored by the House of Lords. Mr. Justice Farwell regarded the union as a legal entity—an idea expressly repudiated by the Court of Appeal. In the House of Lords the Chancellor and Lords Brampton and Shand distinctly inclined to that view however. Although the opinions of Lords Macnaghten and Lindley were ambiguous on this point, the latter thought the individual members would not be liable at law for the acts of the society. But the meaning and scope of the injunction were not accurately defined by any of the judges who considered the case.

That men by forming an association can free both themselves and the association from liability for the acts of their agents cannot be the law, in the absence of legislative enactments plainly to that end. For its clear assertion of this principle the present case is admirable. But in the important practical question of determining who is responsible for the acts of an organized association, under given circumstances, the opinions help little. A main factor in answering this question is the legal character of the association. If the body is one recognized by the law as a distinct entity, that entity alone is primarily liable, and the individual members are liable only secondarily if at all. An injunction against the association like a judgment would usually affect directly only the association, and not the members. So if the members as individuals and not as agents of the association should do acts prohibited by the injunction, they would not be liable for violation of the injunction, although under some circumstances possibly liable for contempt of court. See *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180, 181; *Avory v. Andrews*, 30 W. Rep. 564; *Mayor, etc., v. New York, etc., Co.*, 64 N. Y. 622. On the other hand, if the body is legally not an entity, but a mere collection of individuals, these individuals are primarily liable for their agents' acts. If it be impracticable to join all these individuals as defendants, courts of equity find no difficulty in allowing some to represent all. See *Meux v. Maltby*, 2 Swanst. 277.

The orthodox doctrine of the common law, which recognizes only individuals and corporations as entities, undoubtedly lags far behind the ordinary conceptions of laymen. The principal case is indicative, perhaps, of a tendency to abandon this doctrine whenever justice or expediency requires it. Before the Trade Union Acts of 1871 and 1876 trade unions were as entities hardly distinguishable from other unincorporated associations. So far, however, as their purposes were in restraint of trade—and this was a main object of most of the societies—the unions were illegal. The Act of 1871 provided that the purposes of trade unions should not be deemed unlawful merely because in restraint of trade. The Acts further provide certain formal requirements in regard to the registration of trade unions, and prescribe the mode in which the

property of the unions shall be held by trustees. It is not expressly stated that registered unions may be sued by their registered names. The Acts in no way create trade unions, they simply regulate the trade unions hitherto existing. From this case it would appear that statutory regulation of unincorporated associations less than that usually believed requisite to create corporations may suffice to induce the English courts to recognize them as legal entities. Public policy would not prevent the courts from going still further in making the law in regard to associations accord with the actual facts.

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SUBSCRIPTIONS TO CHARITABLE ORGANIZATIONS. — Theory and decision are unfortunately in irreconcilable conflict in the majority of instances where charitable subscriptions have been enforced. In a late case a subscription for the purchase of a church site is held binding, on the ground that the consideration for the defendant's promise is to be found in the meritorious object of the subscription and in the mutual promises of the subscribers. *First Church v. Pungs*, 86 N. W. Rep. 235 (Mich.). Although many authorities accord with this decision it is impossible to agree with it unless it can be rested on other grounds than those stated. To support the subscriber's promise a consideration must move from the other contracting party, — in conventional phrase, the promisee must incur a detriment at the request of the promisor. 12 HARVARD LAW REVIEW, 515. Ordinarily the subscription paper contains, in express terms at least, neither a request by the subscriber nor a promise by the beneficiary. The subscription usually is a mere gratuity. *In re Hudson*, 54 L. J. Ch. 811.

The American courts at first found this difficulty insuperable, but their desire to enforce promises so obviously binding *in foro conscientie* led to the gradual adoption of various specious suggestions of consideration. See note, 16 Am. Law Reg. n. s. 548. The modern law on the subject is in great confusion and incumbered with many inaccurate statements. It is often said, as in the principal case, that the mutual promises of the subscribers form the consideration. *Petty v. Trustees of Church*, 95 Ind. 278. Even if it be in fact true that the subscribers give their promises in exchange for each other, the beneficiary of the subscription, who is usually the plaintiff, is not privy to the contract. *Cottage Street Church v. Kendall*, 121 Mass. 528. In states where a beneficiary is allowed to sue, however, a satisfactory result may be worked out on this doctrine if the facts admit of its application. Cf. *Irwin v. Lombard University*, 56 Oh. St. 920. But usually such a construction of the facts is false. It is also a fictitious consideration that is found in an implied counter-promise by the beneficiary, arising when the subscription is accepted or acted upon. *Maine Institute v. Haskell*, 73 Me. 140. A third view enforces the promise on the theory that the subscriber is equitably estopped from denying the consideration after the beneficiary has acted on the faith of it. *Beatty v. Western College*, 177 Ill. 280. This avoids the contractual difficulty only by substituting an infringement of the doctrine of estoppel. See 12 HARVARD LAW REVIEW, 506. The most generally accepted theory considers the subscription an offer merely, which is made binding when expense or liability has been incurred in reliance upon it. *Trustees of Church v. Garvey*, 53 Ill. 401.



This necessitates an implied request by the promisor that such liability be incurred — an implication of fact, not usually justifiable. *Presbyterian Church v. Cooper*, 112 N. Y. 517. If a request can be inferred from the subscriber's promise, it would seem that entire performance and not merely a beginning of the contemplated undertaking would be requisite to complete the unilateral contract. Where there has been an express request however, there is of course no difficulty in enforcing the subscription after performance by the beneficiary. On this ground the principal case might possibly have been rested. Cf. *Barnes v. Perine*, 12 N. Y. 18.

Although on strict theory a charitable subscription can seldom be construed as a binding contract, it is eminently desirable in many cases that such subscriptions, although gratuities, should be enforced, as numerous worthy institutions are absolutely dependent upon them. Such enforcement, however, if it is to rest upon consistent and rational grounds must be obtained through suitable enactment by state legislatures, and not through judicial legislation, which violates the fundamental principles of contracts.

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LEGAL PROTECTION TO UNBORN CHILDREN. — By Lord Campbell's Act, where death has resulted from a wrong which would have entitled the injured party to sue had he lived, a cause of action is given to his administrator or next of kin. Under a similar statute the death of a child caused by its premature birth for which the defendant was responsible was held to give no cause of action, as the child could not have sued if it had survived. *Gorman v. Budlong*, 49 Atl. Rep. 704 (R. I.). It is true that a child harmed before birth has been invariably denied redress by the courts, on the ground that rights belong only to persons and that an unborn child is not a person. *Walker v. Great Northern Ry. Co.*, L. R. (Ir.) 28 Q. B. & Ex. Div. 69; *Allaire v. St. Luke's Hospital*, 184 Ill. 359. The plaintiffs seem never to dispute this reasoning, but they rely on that rule governing the distribution of property, that a child is to be considered born if it is for its benefit to be so considered. The decisions however must be taken to settle beyond pertinent discussion that to apply this rule as suggested is either to make the defendant a tort-feasor by a fiction, or substantially to change the convenient and fundamental rule that fixes birth as the precise point at which existence as a person begins. See 12 HARVARD LAW REVIEW 209. If then a child permanently crippled a moment before its birth by a careless *accoucheur* or even by an intentional wrong-doer is to have a remedy, it must be on some other ground.

One conceivable theory involves no sacrifice of legal principle. At the moment of birth the rule that an unborn child has no rights ceases to affect the case. If the child at birth acquires as a legal person a specific right to begin life with a sound body, violation of that right is a tort. To allow an action on the case would not be to declare that an unborn child is a person or has rights, but to ascribe to every born child a right of bodily integrity. The right so defined has never been judicially recognized. It is peculiar in being broken as soon as it comes into existence, and necessarily some considerable time after the defendant's original fault was committed. Its peculiarities however are common to the right to means of support conceived by courts which give a

posthumous child damages for the wrongful killing of its father. See *The George and Richard*, L. R. 3 A. & E. 466; cf. *Quinlen v. Welch*, 69 Hun 584.

In view of the serious abuses which might result, the expediency of recognizing a legal right of the sort described is doubtful. On the difficult question of cause the mother may incline to romancing and the jury to superstition. *Gorman v. Budlong*, *supra*, shows an additional danger likely to be frequent. The child has died soon after birth. If it has suffered a tort an action by the next of kin, though perhaps not contemplated by the framers of Lord Campbell's Act, is strictly within its provisions; and substantial verdicts often undeserved may result. In many such cases recovery could be refused only on the ground that these abuses render it inexpedient to recognize at all the right of bodily integrity. Whether this ground should be taken, it is submitted, is the real question.

## RECENT CASES.

**ADMIRALTY — MASTER OF A DREDGE — LIEN FOR WAGES.** — A libel for wages was filed against a dredge. The libellant was licensed as master, had full charge of the dredge, and performed the usual duties of a master except that he received no money for the owners. He also acted as engineer, fireman, and general deck hand. *Held*, that he was not a master within the rule that a master has no lien upon his vessel for wages. *The John McDermott*, 109 Fed. Rep. 90 (Dist. Ct., Conn.).

In England originally contracts of mariners for wages were not regarded as maritime contracts. See *De Lovio v. Boit*, 2 Gall. 398, 453. Therefore neither masters nor men could proceed in admiralty for their wages. When, later, seamen were allowed a lien enforceable in admiralty, the privilege was still denied to masters on the ground that they contracted with the ship-owner personally. *Clay v. Snelgrove*, Carth. 518. In the United States, likewise, a master has no lien. *Steamboat Orleans v. Phoebus*, 11 Pet. 175. His contract for wages, however, is regarded as maritime and within the admiralty jurisdiction. *Willard v. Dorr*, 3 Mason 91. Further, it has been held in this country that the fact of contracting directly with the owner does not prevent the acquisition of a lien. *The Carlotta*, 30 Fed. Rep. 378. Thus the principal reasons given in the English cases for denying the master a lien and for distinguishing between masters and seamen, have been swept away, while the distinction is retained. The courts have therefore shown a not unnatural tendency to limit the class of masters as narrowly as possible, and while the principal case lays down no satisfactory test, its result is hardly to be regretted. In England the distinction is now abolished by statute.

**BANKRUPTCY — PREFERENCES — SURRENDER.** — A creditor knowingly received a preference voidable under the Bankruptcy Act of 1898, § 60 b, and refused to give it up till compelled to do so under a judgment obtained by the trustee. *Held*, that he could not thereafter prove his claim against the bankrupt's estate. *In re Owings*, 109 Fed. Rep. 623 (Dist. Ct., W. D. Mo.).

The Bankruptcy Act of 1898 provides (§ 57 g) that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." There is yet little authority as to what constitutes a surrender under this provision, but the tendency seems to be toward the rule of the principal case. *In re Beiber*, 2 N. B. N. Rep. 943; see *In re Keller*, 3 N. B. N. Rep. 845; *contra*, *In re Baker*, 2 N. B. N. Rep. 195. It was well established under the analogous provision in the Bankruptcy Act of 1867, § 23, that surrender meant a voluntary act of the creditor and did not include payment under judgment. *In re Richter's Estate*, 4 N. B. R., 2nd ed., 221; *In re Leland*, 9 N. B. R. 209. That interpretation of the word seems accurate, for when the transfer of the preference has been invalidated by the

court, the creditor has in legal contemplation nothing left to surrender. The result is equitable, for when a creditor has elected to resist the trustee, he should not stand on an equal footing with those over whom he has attempted to retain an illegal advantage.

**BILLS AND NOTES — ALTERED CHECKS — FAILURE OF DEPOSITOR TO EXAMINE VOUCHERS.** — The plaintiff's clerk altered checks drawn by the plaintiff on the defendant bank, and appropriated the proceeds above the original amount of the checks. It was his duty to examine the returned vouchers. The bank charged the plaintiff with the full amount of the checks and the fraud was undiscovered for about two years. The plaintiff sues for the difference between the amount of the checks as signed by him and as altered. *Held*, that he can recover. *Critten v. Chemical Nat. Bank*, 60 N. Y. App. Div. 241.

It seems to be generally considered in America that a depositor who fails to examine his vouchers within a reasonable time after their return, is precluded from disputing the right of the bank to charge him with the amount of altered checks. *First Nat. Bank v. Allen*, 100 Ala. 476; see also note, 27 L. R. A. 426. The principle seems to be estoppel by conduct. Some cases deny the estoppel when the examination of the vouchers has been intrusted by the depositor to the man who altered the check. *Hardy v. Chesapeake Bank*, 51 Md. 562; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209. The better rule, however, makes no exception of such cases. *Leather, etc., Bank v. Morgan*, 117 U. S. 96; *Dana v. Nat. Bank of the Republic*, 132 Mass. 156. It rests upon the ground, not that the principal is affected with knowledge gained by the agent in perpetrating the fraud, but that the bank, by reason of its business relationship with the depositor, is entitled to rely upon the assumption that he has made the examination customary among prudent business men. Whether he does so personally or by agent does not concern the bank, and the negligence or fraud of the agent cannot excuse the principal. Cases of forged indorsement, sometimes cited as opposed to these principles, are not in point, since an examination of vouchers would not reveal the forgery. See *Shipman v. Bank of the State of New York*, 126 N. Y. 318. The result in the principal case, therefore, seems unsound.

**CARRIERS — AGENCY — DELIVERY TO AN IMPOSTOR.** — X, who lived in a town to which an express company did not run, instructed the company to deliver to the conductor of a railway train which ran to his town, all packages addressed to him. The railroad company was paid for the service. An impostor ordered goods in the name of X, and they were shipped in the usual way. The agent of the railroad offered the goods to X, who after examination refused to receive them. Later the impostor called for the package, claiming the same name as X and identifying himself by showing the express receipt. The agent of the railroad delivered the goods. Suit was brought by the consignor against X and the railroad company. *Held*, that both are liable for the value of the goods. *Bruhl v. Coleman*, 39 S. E. Rep. 481 (Ga.).

The decision holding X liable for the delivery to the impostor, is based on the ground that the railroad company, by virtue of its arrangement with X, received this package and dealt with it as his agent. It is submitted that this is error. The railroad company was not in his employ in the sense that it was bound by his orders. It was paid a fixed charge for its services, and was clearly in the position of a second carrier. Therefore when the supposed consignee refused the goods, his responsibility ceased. The question remains whether the carrier was properly held liable for misdelivery. The weight of authority both in this country and in England holds that after reasonable effort to find the consignee or after tender and refusal the carrier is bound only to use reasonable care and is not an insurer against misdelivery. *The Drew*, 15 Fed. Rep. 826; *Heugh v. London, etc., Ry. Co.*, L. R. 5 Ex. 51; *contra*, *Pacific Express Co. v. Shearer*, 160 Ill. 215; see also note, 37 L. R. A. 177. The prevailing view seems the sound one, and is apparently opposed to the decision in the principal case. It is therefore unnecessary to consider the difficult question of title in the goods. See 14 HARV. LAW REV. 60.

**CONFLICT OF LAWS — RECOGNITION OF ACQUIRED RIGHTS — FOREIGN MARRIAGE.** — A Russian Jew married his niece in Russia, where such marriage was lawful. Later he came to the United States and was naturalized. By the law of Pennsylvania such a marriage, if contracted there, would be void. *Held*, that the marriage will not be recognized in Pennsylvania, since a continuance of the relation would expose the parties to indictment. *United States ex rel. Devine v. Rodgers*, 109 Fed. Rep. 886 (Dist. Ct., E. D. Pa.).

In general where the *lex domicilii* coincides with the *lex loci contractus* in giving a person capacity to marry, the marriage contracted by him will everywhere be recognized as valid. *Sutton v. Warren*, 10 Met. 451. Nevertheless a marriage deemed incestuous by the general consent of Christendom will not be recognized. See STORV, CONFLICT OF LAWS, § 114. Such marriages, however, are those only which are in direct line of consanguinity, or between brother and sister. *Wightman v. Wightman*, 4 Johns. Ch. 343; *Stevenson v. Gray*, 17 B. Mon. 193. The court in the principal case makes a further exception of marriages which are incestuous by statute of the particular state in which recognition of the marriage is sought. The weight of authority in this country is to the contrary. *Stevenson v. Gray*, *supra*; *Commonwealth v. Lane*, 113 Mass. 458. In England, there are *dicta* on both sides of the question. *Brook v. Brook*, 9 H. L. Cas. 193; *Fenton v. Livingstone*, 3 Macq. H. L. 497; *Sottomayor v. De Barros*, 3 P. D. 1. Since marriages between uncle and niece are permitted by many states, a rule like that contended for in the principal case might cause much hardship. Whether the parties shall be allowed to live together in violation of the criminal statutes is quite a different question.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — FRONT FOOT RULE — An assessment for the paving of a street was levied on the abutting owners according to the "front foot rule." *Held*, that the assessment does not violate the Fourteenth Amendment. *Zehnder v. Barber, etc., Co.*, 108 Fed. Rep. 570 (Cir. Ct., Ky.). See NOTES, p. 307.

CONSTITUTIONAL LAW — LEGISLATIVE QUESTION — POPULATION OF COUNTIES. — County commissioners being about to issue bonds, the plaintiff asked for an injunction against them on the ground that the county at the time of its creation by statute had not the number of voters required by the constitution. *Held*, that the injunction will not issue, because the question whether the constitutional requirement as to population was satisfied is one exclusively of legislative cognizance. *Farquharson v. Yeargin*, 64 Pac. Rep. 717 (Wash.).

There is at least one contrary decision on exactly the same point. *Bridgeman v. Rogers*, 1 Cold. 259. Furthermore, there would seem to be no difference in principle between the application of a constitutional provision as to the population of counties and of a similar clause regarding area. This substantial identity being recognized, the weight of authority is strongly against the principal case. *McMillan v. Hannah*, 61 S. W. Rep. 1020. It is submitted, however, that the case represents the better doctrine. It is well settled that under our system many constitutional provisions raise questions on which the legislature or the executive is the final judge; and the courts must then accept the decision, which is as conclusive as those of the courts in cases of judicial cognizance. *Field v. Clark*, 143 U. S. 649; *Luther v. Borden*, 7 How. 1, 42. The line between legislative and judicial questions is not always easy to draw, but it would seem that the legislature is better constituted than the judiciary to decide questions like that in the principal case. Moreover no advantage is apparent from allowing judicial revision of the legislative action, which is not overbalanced by the obvious inconvenience resulting. Two previous decisions have been found in support of this view. *De Camp v. Eveland*, 19 Barb. 81; *Lusher v. Sciles*, 4 W. Va. 11.

CONTRACTS — CONSIDERATION — FORBEARANCE OF A BONA FIDE CLAIM. — *Held*, that forbearance to prosecute a claim honestly made but not legally valid is no consideration for a promise. *Price v. First Nat. Bank*, 64 Pac. Rep. 639 (Kan.).

The rule here followed was repudiated in England by the case of *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449 (1870). In America some jurisdictions support the doctrine of the principal case. *Bates v. Sandy*, 27 Ill. App. 552. Yet the weight of authority inclines toward the English rule. *Prout v. Pittsfield Fire Dist.*, 154 Mass. 450. It would seem that detriment to the promisee is the scientific test of consideration. See LANG., SUM. CONT. § 45 *et seq.* But there are two theories as to the application of this test. One holds that detriment includes any act or forbearance given in exchange for a promise. See 12 HARV. LAW REV. 515 *et seq.* Under this view the principal case is clearly unsound. But the prevailing opinion seems to be that the act or forbearance must be one not required by previous legal obligation. See 8 HARV. LAW REV. 27 *et seq.* Regarding consideration from the standpoint of the parties at the time of the agreement, as the law seems properly to do, the second theory will not support the principal case; for one honestly believing his claim to be valid has a legal right to litigate it, and in forbearing, does what he was not legally bound to do. See,

however, LANG., SUM. CONT. §§ 56, 57. The principal case is further open to the practical objection that it discourages compromise.

CONTRACTS—CONSIDERATION—SUBSCRIPTION TO CHURCH FUND.—The defendant signed a subscription paper for the purchase of a church site, and the church afterward contracted for the land. *Held*, that the defendant's promise is supported by a valid consideration and enforceable. *First Church v. Pungs*, 86 N. W. Rep. 235 (Mich.). See NOTES, p. 312.

CONTRACTS—CONSIDERATION—SUCCESSIVE PROMISES OF THE SAME PERFORMANCE.—*Held*, that the promise of one party to an existing contract to perform his obligation under that contract, is not a valid consideration for a new promise by the other party. *Wescott v. Mitchell*, 50 Atl. Rep. 21 (Me.).

In this country there has been a long continued conflict in both opinion and judicial decision on the question raised by the principal case. Some courts have held the consideration valid and the contract good on the ground of an implied rescission of the former contract. *Goebel v. Linn*, 47 Mich. 489. This theory is applicable only when the first contract was bilateral, and moreover there is generally no evidence that the parties intended a rescission. Again the validity of the second contract has been defended on the theory that any promise given in exchange at the request of the other party is good consideration, and that there should be no attempt to determine the value of the promise. See 13 HARV. LAW REV. 29. It seems, however, the better view, and one supported by at least a balancing weight of authority, that the law will not regard as a detriment a promise to perform what one is already bound to the promisee to do. *Ayres v. Chicago, etc., R. R. Co.*, 52 Iowa 478; see 8 HARV. LAW REV. 27. The law in England seems to be settled in accord with this view. *Fraser v. Hutton*, 2 C. B. N. S. 510.

CONTRACTS—EXCUSE—REPUDIATION—ELECTION NOT TO TREAT AS BREACH.—*Held*, that when a contract of mutual obligation is repudiated by one party, and the other party has not elected to treat such repudiation as a breach, the latter is not excused from continuing to perform on his part. *Smith v. Georgia Loan, etc., Co.*, 39 S. E. Rep. 410 (Ga.). See NOTES, p. 306.

CONTRACTS—NOTE EXECUTED ON SUNDAY—SUBSEQUENT PROMISE.—A note was delivered on Sunday in payment of the difference on an exchange of personal property concluded on that day. On a subsequent week-day the maker of the note made an express promise to pay the amount. *Held*, that the payee is entitled to recover against the maker. *Brewster v. Banta*, 49 Atl. Rep. 718 (N. J., Sup. Ct.).

Contracts made on Sunday are generally rendered illegal by statute, and the courts commonly refuse all aid to either party. *Block v. McMurray*, 56 Miss. 217. Recovery, therefore, in cases like the principal one, is hard to sustain. The new promise cannot be treated as waiving a purely personal defence, for contracts like this are uniformly held void. No subsequent ratification can possibly validate such an agreement. *Reeves v. Butcher*, 31 N. J. Law 224. On the other hand, it seems impossible to support action on the new promise without conceding the adequacy of moral consideration. Apart from certain well-defined exceptions which do not cover the principal case, this concession is generally denied, even in New Jersey. *Updike v. Titus*, 13 N. J. Eq. 151; see 15 HARV. LAW REV. 73. The principal case represents an existing tendency to avoid the hardship resulting from declaring Sunday contracts void, where something of value has passed between the parties. See *Catlett v. Trustees, etc.*, 62 Ind. 365. Substantial justice would, however, be more logically attained by declaring the transaction inoperative to create rights or to pass title, allowing recovery back of anything delivered or paid. Such recovery has been allowed in at least one state. *Tucker v. Mowrey*, 12 Mich. 378; see also *Havey v. Petrie*, 100 Mich. 190.

CORPORATIONS—LEGAL STATUS OF ENGLISH TRADE UNIONS.—*Held*, that an injunction will lie against a registered trade union in its registered name. *Taff Vale Ry. Co. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426. See NOTES, p. 311.

CRIMINAL LAW—LARCENY BY TRICK—FRAUDULENT GAMING.—The prosecuting witness in good faith engaged in a game of cards with the defendant and others. He placed his stake on the table before him, and allowed it to be taken by the confederates of the defendant without protest when he had lost the bet. The game was

won by fraud, and the defendant enticed the prosecuting witness into it and participated in the fraud. *Held*, that the defendant was guilty of larceny. *State v. Skilbrick*, 66 Pac. Rep. 53 (Wash.).

This was clearly not ordinary larceny, for the money was taken with the consent of the owner. The question remains whether it was larceny by trick or obtaining property by false pretences. The fundamental distinction between these two is that in the former the owner intends to part with possession only and in the latter to part with both possession and title. *Regina v. Solomons*, 17 Cox C. C. 93; *Smith v. People*, 53 N. Y. 111. The courts have in terms recognized this distinction, even when they have gone far toward destroying it by straining the facts in sustaining convictions for larceny. *Regina v. Russett*, [1892] 2 Q. B. 312; *People v. Rae*, 66 Cal. 423. In the principal case it seems clear that the prosecuting witness retained possession of the money till the cards were displayed, and then consented to give up possession and title together. If the distinction is to be maintained this must be held to be obtaining money by false pretences and not larceny.

**DAMAGES — CONVERSION — WILFUL AND INNOCENT WRONGDOERS.** — The defendant, having wilfully converted goods of the plaintiff, increased their value by his labor. *Held*, that he is liable in trover for the value at the time the action was begun, without deduction for his labor. *Central Coal, etc., Co. v. John Henry Shoe Co.*, 63 S. W. Rep. 49 (Ark.).

By way of *dictum* the court says that the measure of damages as against an innocent wrongdoer would be the value of the goods at the time of the original conversion. The rules laid down in the decision and the *dictum* are the same as those of the Civil Law. WOOD, INSTS. CIVIL LAW, 92. The early common law also seems to support them. 2 KENT, COM., 363. The weight of American authority is to the same effect. SEDGWICK, DAMAGES, 88; see also *Woodenware Co. v. United States*, 106 U. S. 432. The reason given for the distinction is that it tends to check wilful wrongdoing. The soundness of this appeal to public policy is at least doubtful. The aim of our law in redressing private wrongs would seem properly to be merely to compensate, and not to punish. If the owner receives the value of the goods at the time of the original conversion, with interest, his actual loss at the hands of the wrongdoer is fully recompensed, and at this point the law ought to stop. There is some authority in support of this view and opposed to the distinction drawn in the principal case. *Single v. Schneider*, 30 Wis. 570. The question here discussed is to be distinguished from that of exemplary damages.

**DEATH BY WRONGFUL ACT — PREMATURE BIRTH NEGLIGENCELY CAUSED.** — The defendant's negligence caused the premature birth of a child, and this resulted in the child's death. *Held*, that the defendant is not liable under the usual statute allowing an action for death by wrongful act. *Gorman v. Budlong*, 49 Atl. Rep. 704 (R. I.). See NOTES, p. 313.

**EQUITY — SPECIFIC PERFORMANCE — ENTIRE CONTRACT FOR THE SALE OF REALTY AND PERSONALTY.** — *Held*, that a single contract for the sale of a plantation together with the stock, implements and supplies thereon may be specifically enforced as an entirety. *Brown v. Smith*, 109 Fed. Rep. 26 (Cir. Ct., S. C.).

It is well settled that ordinarily a contract for the transfer of a chattel will be specifically enforced only where the chattel to be transferred has some unique, sentimental, or artistic value. *Dowling v. Betjemann*, 2 Johns. & Hem. 544. It is equally well settled however as a general principle, that where the plaintiff is entitled to equitable relief and also to legal relief, equity on taking jurisdiction will, to avoid multiplicity of suits, do complete justice, although in doing so it may decree on matters otherwise cognizable only at law. See POM., EQ. JUR. § 181. The contract in the principal case being in part for the conveyance of land, it seems proper for equity to take jurisdiction; and if so it is strictly in accord with equitable principles that specific performance be decreed as to the chattels, in a suit on the whole contract, and that the plaintiff be not forced to sue at law for damages in respect to them. Authority on the point is very meagre; but the cases found apply the same rule as the principal case. *Leach v. Fobes*, 77 Mass. 506, 510; *Perin v. Megibben*, 53 Fed. Rep. 86, 91.

**EQUITY — SPECIFIC PERFORMANCE — INADEQUACY OF CONSIDERATION.** — The defendant, having reason to think he could sell a lot of land to X provided he could

convey it with an adjoining strip, contracted to buy the strip from the plaintiff, who, knowing the defendant's position, made the price excessive. X subsequently declined to buy. *Held*, that specific performance, being inequitable, will not be decreed. *Esper v. Wilson*, 60 N. E. Rep. 923 (Ill.).

Relief by specific performance of a contract over which equity has jurisdiction, undoubtedly rests on the sound discretion of the court, upon consideration of the circumstances. See *Radcliffe v. Warrington*, 12 Ves. Jun. 326, 331. But the exercise of that discretion seems to be regulated by certain broad rules. It is generally said that where the contract imposes great hardship, or where unfair advantage has been taken, equity will not act. See *Seymour v. Delancy*, 3 Cow. 445, 505. But where the hardship objected to was foreseeable, and the parties contracted deliberately with open eyes, specific performance has often been granted. *Adams v. Weare*, 1 Bro. Ch. 567. Accordingly many cases hold that mere inadequacy of consideration is not sufficient to bar the remedy. *Ready v. Noakes*, 29 N. J. Eq. 497. On principle the contracting parties, rather than the court, should be the judges of the value to them of a contract. The position of the court in the principal case, in refusing to enforce what is simply a hard bargain, seems contrary to the modern tendency.

EVIDENCE — CONFESSIONS — PRIVILEGE — ADMISSIBILITY OF TESTIMONY BEFORE GRAND JURY. — *Held*, that the testimony of the accused before a grand jury, which was investigating the crime for which he was subsequently indicted, was properly admitted as evidence against him at the ensuing trial. *Wisdom v. State*, 61 S. W. Rep. 926 (Tex., Cr. App.). See NOTES, p. 308.

EVIDENCE — HEARSAY — INTENT. — In a prosecution for attempting to bribe an election judge to sell an official ballot before the election, the defence was that the sole intent of the accused in offering the money was to persuade the judge to produce the ballot, which he had no right to have in his possession at that time, in order that he might be arrested with the ballot in his hands. To prove this intent, the accused proposed to show, by a conversation between the mayor and himself, the plan he was pursuing. *Held*, that such evidence was improperly excluded as hearsay, since the conversations were part of the *res gesta* and were also competent as declarations of intention. *Banks v. State*, 60 N. E. Rep. 1087 (Ind.).

In general, when intention is material, a party's declarations as to his intent, though in their nature hearsay, are admitted according to the best view as an exception to the hearsay rule. *Mutual, etc., Ins. Co. v. Hillmon*, 145 U. S. 285; see 7 HARV. LAW REV. 117. Many courts, as in the principal case, place the admission of such evidence on the ground of *res gesta*. But this term seems properly applicable only to cases of declarations practically simultaneous with the acts charged and explanatory thereof. These are to be distinguished from declarations of intention not simultaneous with the acts in question. *State v. Hayward*, 62 Minn. 474, 497. The result in the principal case, however, is sound on the second ground. It is interesting for the very proper decision that not only the language of the declarant himself is admissible, but also the other half of the conversation, which is so intimately connected with the declarations as to be necessary for their proper understanding.

EVIDENCE — JUDGMENT AS LINK IN CHAIN OF TITLE. — The plaintiff in an action of ejectment, in order to deduce title in himself from X, offered in evidence a judgment in a former action of ejectment brought by the plaintiff's predecessor against X, to which the defendant was not a party or privy. A statute made a judgment in ejectment conclusive as to title upon parties and privies. *Held*, that the judgment, though not conclusive against the defendant's right, was admissible as a muniment of title. *Skelly v. Jones*, 61 N. Y. App. Div. 173.

When offered in evidence against a stranger, judgments are generally excluded as being *res inter alios acta*. *Trustees of Putnam Free School v. Fisher*, 34 Me. 172. But there is apparently an exception in cases where the question adjudicated was that of title as between the parties to the former action, the judgment being, as to that, conclusive upon every one. *Barr v. Gratz's Heirs*, 4 Wheat. 213; *Greenleaf v. Brooklyn, etc., R. R. Co.*, 132 N. Y. 408. The judgment has, accordingly, the same force as a deed of conveyance executed by the party against whom it was rendered. A judgment in ejectment was not, at common law, conclusive as to title even upon the parties to it. *Smith v. Sherwood*, 4 Conn. 276. But in the principal case a statute removes that peculiarity, and places such a judgment within the class above described. The decision, therefore, in admitting the judgment as a muniment of title, seems

sound, and in accordance with authority. The present defendant may still show that his claim is paramount to that established by the judgment, or he may attack the validity of the judgment, just as the validity of a deed may be impeached.

**EVIDENCE — MURDER — DECLARATIONS OF AN ACQUITTED CO-CONSPIRATOR.** — A and B were jointly indicted for murder, but were tried separately, and A was acquitted. On the trial of B, a conspiracy between A and B to commit the murder having been established, declarations by A before the commission of the crime were admitted. *Held*, that such admission was proper. *Musser v. State*, 61 N. E. Rep. 1 (Ind.).

The general rule in prosecutions for conspiracy is that evidence of the acts or declarations of one of the accused persons is admissible against any other, on the ground of common interest. *Clune v. United States*, 159 U. S. 590; *Card v. State*, 109 Ind. 415. But when one of several alleged conspirators has been acquitted of that crime, his acts and declarations are no longer provable against the others, as his acquittal is regarded as disproving his participation in the common agreement. *Paul v. State*, 12 Tex. App. 346. Since in all cases the admission of the testimony depends upon proof of the common agreement, this is clearly correct in a case where the conspiracy is the subject of the investigation. But where, as in the principal case, the chief inquiry is as to another crime, and the conspiracy is but an incident, the acquittal of one defendant, accused as a principal, does not disprove his connection with the others in the preliminary agreement; and if the conspiracy is established, the evidence, which has an obvious bearing on the main inquiry, should still be competent. *Holt v. State*, 39 Tex. Cr. Rep. 282, 300. On this ground, therefore, the decision in the principal case is clearly right.

**MUNICIPAL CORPORATIONS — UNAUTHORIZED CONTRACTS — EMPLOYMENT OF ADVERTISING AGENT.** — The city council of Cape May employed a man to represent the city as an advertising agent and bring before the public the claims of the city as a summer resort. *Held*, that the municipality cannot legally pay his expenses, since the employment of such an agent was unauthorized by its charter. *State v. City of Cape May*, 49 Atl. Rep. 584 (N. J., Sup. Ct.).

Since the powers of a municipality are limited to those delegated by its charter, their extent is a subject of construction. The established rule is that the corporation possesses only those powers granted in express words, those necessarily implied in or incidental to the express powers, and those essential to the declared objects and purposes of the corporation. *Ottawa v. Carey*, 108 U. S. 110, 121; *Cook County v. McCrea*, 93 Ill. 236. The reason for this strict construction is inherent in the nature of such corporations; the power of a majority, even within the limits of the charter, to subject the whole community to taxation and other burdens, against the will of a large minority, is dangerous and requires close restriction. See *Spaulding v. Lowell*, 40 Mass. 71, 74. On this ground courts have held municipal acts void which granted money for celebrations, and for expenses of committees opposing legislative measures. *New London v. Brainard*, 22 Conn. 553; *Coolidge v. Brookline*, 114 Mass. 592. From this point of view, the employment of an agent to advertise a sea-side resort seems clearly outside the ordinary powers of municipal corporations; and since the charter in the principal case contained no special authorization, the decision seems correct.

**PROCEDURE — FEDERAL COURTS — REMOVAL OF CAUSES — LOSS OF JURISDICTION.** — All the parties to an action were citizens of Kentucky except one defendant, a citizen of Ohio. After removal of the entire case by the latter to the federal court on the ground of a separable controversy within the Act of 1888, ch. 866, sec. 2 (25 U. S. Stat. 434), the suit was discontinued as to him. *Held*, that the court having no further jurisdiction, the case must be remanded to the state court. *Youtsey v. Hoffman*, 108 Fed. Rep. 699 (Cir. Ct., Ky.).

A federal court having once taken jurisdiction, will not be ousted by a change in the citizenship of either party or in the ownership of the subject matter. *Morgan v. Morgan*, 2 Wheat. 290; *Glover v. Shepperd*, 21 Fed. Rep. 481. So jurisdiction will not be divested by the admission as co-defendant of a citizen of the same state as the plaintiff, nor even by the substitution of such a defendant; nor by the reduction of the amount involved below the statutory limit. *Phelps v. Oakes*, 117 U. S. 236; *Hardenbergh v. Ray*, 151 U. S. 112; *Hayward v. Nordberg*, 85 Fed. Rep. 4. Indeed, the rule is laid down broadly by the most eminent authority that jurisdiction depends upon the circumstances at the beginning, and that having once properly attached, it cannot be divested by subsequent events. *Mollan v. Torrance*, 9 Wheat. 537. The



principal case seems clearly opposed to this rule and cannot be distinguished from the cases above cited. Some authority, however, is found in its support. *Texas Transportation Co. v. Seeligson*, 122 U. S. 519; *Bane v. Keefer*, 66 Fed. Rep. 610. Expediency seems better served by adhering to the general rule, by which delay and expense in the adjudication of suits are avoided.

**PROPERTY — EASEMENTS — CHANGE BY PAROL AGREEMENT.** — The plaintiffs had a right of way over land of the defendant. In consideration of the latter's opening a new way across the land, they agreed orally that the old way might be closed, and this was accordingly done in a manner obviously intended to be permanent. Afterward the defendant obstructed the new way. *Held*, that the defendant will be enjoined from closing the new way without restoring the old one. *Wright v. Willis*, 63 S. W. Rep. 991 (Ky.).

The license to use the new way, like any license to do acts on land of the licensor, was, at law, revocable at any time. *Nichols v. Peck*, 70 Conn. 439. But the license given to the servant owner authorized him to do acts on his own land inconsistent with the licensor's easement, and, being acted upon, was irrevocable. *Winter v. Brockwell*, 8 East 308. It might be argued that what the defendant received was a license to obstruct the old way only so long as the new way was kept open. If so, the easement might not be permanently lost. See *Hamilton v. White*, 5 N. Y. 9. But where, as here, the conduct of the parties indicates a permanent abandonment, this construction seems inapplicable, and the easement is therefore extinguished. See *Dyer v. Sanford*, 50 Mass. 395. The license to close the old way was, however, consideration for a parol agreement to give a new way; and this agreement, being removed from the Statute of Frauds by part-performance, is enforceable in equity, by decree ordering a grant, or by injunction. *McManus v. Cooke*, L. R. 35 Ch. D. 681. On principle, then, the court should at least have enjoined the obstruction of the new way unconditionally, treating the old way as lost.

**PROPERTY — EASEMENTS OF LIGHT AND AIR — HIGHWAYS.** — The defendant had obtained permission from the city council to construct a passageway over a street the fee of which was in the city. The plaintiff applied for an injunction on the ground that the structure if completed would deprive his adjoining building of light and air. *Held*, that the injunction should have been granted. *Townsend v. Epstein*, 49 Atl. Rep. 629 (Md.). See NOTES, p. 305.

**QUASI-CONTRACTS — FRAUD OF VENDEE. — DISAFFIRMANCE OF EXPRESS CONTRACT.** — A sale of goods under a contract giving a specified time for payment was fraudulently procured by the purchaser. *Held*, that the vendor may ignore the express contract, and sue in *assumpsit* for goods sold and delivered, before the term of credit has expired. *Crown Cycle Co. v. Brown*, 64 Pac. Rep. 451 (Or.).

This decision is in accord with the authorities in New York and Kentucky. *Roth v. Palmer*, 27 Barb. 652; *Diets's Assignee v. Sutcliffe*, 80 Ky. 650. On the other side are those in England, Massachusetts, and Illinois. *Ferguson v. Carrington*, 9 B. & C. 59; *Allen v. Ford*, 19 Pick. 217; *Kellogg & Co. v. Turpie*, 93 Ill. 265. The point seems not to have arisen elsewhere. That a fraudulent vendee gets legal title to the goods is shown by the fact that he can give good title to a purchaser for value without notice. The vendor retains merely a right equitable in its nature; but he may disaffirm the entire transaction, and maintain trover for the value of the goods. See BENJ., SALES, 445. Courts denying the quasi-contractual remedy hold that bringing *assumpsit* in any form amounts to an affirmation of the express contract. The correctness of this view seems open to question. See KEENER, QUASI-CONTS., 198. Mere disaffirmance of the express contract without demand does not revert the legal title to the goods in the vendor, but leaves the parties standing on the relation arising out of the delivery of the goods to the vendee. There seems, therefore, no inconsistency in allowing the quasi-contractual action.

**SALES — CONDITIONAL SALE — TRANSFER OF SELLER'S CLAIM — TITLE TO CHATTEL.** — The defendant's note, given for mules delivered to him, stated that title to the mules was to remain in the seller or order until the note should be paid. The note having matured and been assigned, the seller brings trover for the use of the assignee. *Held*, that since assignment of the note operated to vest in the defendant an unincumbered title to the mules, it was error to direct a verdict for the plaintiff. *Burch v. Pedigo*, 39 S. E. Rep. 493 (Ga.).

The question how an assignment of the seller's claim in cases like the present affects the title originally retained for security has been answered by courts in three different ways. One view is that maintained by the plaintiff here, that title remains in the seller, but in trust for his assignee. *McPherson v. Acme Lumber Co.*, 70 Miss. 649. A second is that the legal title passes to the assignee. *Esty v. Graham*, 46 N. H. 169; *Kimball Co. v. Mellon*, 80 Wis. 133, 143. The third, that of the principal case, is without discovered precedent. It is further discredited by the rule established for the analogous cases of chattel mortgages, that the *dominus* of the claim owns the security, either equitably or legally. *Honck v. Linn*, 48 Neb. 227; *cf. Ramsdell v. Truaksbury*, 73 Me. 197. In both classes of cases the debtor's own agreement precludes him from claiming title until he pays. Whether the legal title passes to the assignee depends on the intention of the parties to the assignment. The interests of both parties would seem to justify a presumption that it does. In the principal case the provision as to title contained in the note points strongly in the same direction. The actual decision, therefore, though based on an erroneous conception, is apparently right.

**SALES — FRAUD OF AGENT — ESTOPPEL.** — The plaintiff authorized a dock company to deliver the plaintiff's lumber to the orders of one C., the plaintiff's clerk, who had a limited authority to make sales. C. fraudulently obtained transfers into the name of B., a fictitious person, and then in the character of B. sold the lumber to the defendant, who took without notice of the fraud. The plaintiff brings an action for conversion. *Held*, that since the plaintiff enabled C. to hold himself out as the owner of the goods, he cannot recover. *Farquharson Bros. & Co. v. King & Co.*, 49 W. Rep. 673 (C. A.).

The plaintiff did not give C. the apparent ownership which was relied on by the defendant to his detriment, and though he may have been negligent as to his own interests, it cannot be said that a man owes a duty to others to make it impossible for his agent to rob him. Similar reasoning to that in the principal case would enable every salesman in a shop to pass clear title by estoppel to goods stolen from his employer. Several cases were cited to support the principal decision, but though they contained statements broad enough, these were not necessary to the decisions. Certainly the mere fact of giving another person power to commit fraud is not sufficient to raise an estoppel against the person giving the power. *Cole v. North Western Bank*, L. R. 10 C. P. 354; *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32. Nor does the additional fact that the authority given was intended to be relied upon by others, estop the giver when such authority is exceeded. *Swan v. North British, etc., Co.*, 2 H. & C. 175. The decision of the principal case, therefore, seems wrong. *Cf. Lamb v. Attenborough*, 1 B. & S. 831.

**STATUTE OF LIMITATIONS — PART PAYMENT — APPLICATION OF PAYMENTS.** — An agent for collection held three notes signed by the defendant, two as maker and one as surety. There was an understanding that any payment made by the defendant on the obligation as surety should also be credited on the notes made by him, the payee of these notes being the principal for whom he stood as surety on the third note. After action on the notes made by the defendant had become barred by the Statute of Limitations, the defendant made a payment, which the agent indorsed on the note on which the defendant was surety, and also on the other two notes. *Held*, that this was such part payment as would take the two notes out of the statute, and that recovery may be had on them. *Hopper v. Hopper*, 39 S. E. Rep. 366 (S. C.).

Where a creditor having several claims against a debtor receives a general payment, he may apply it as he pleases, even towards part payment of claims barred by the statute, whether or not the payment exceeds the amount of the enforceable claims. *Mayor, etc., v. Patten*, 4 Cranch 317; *Mills v. Fowkes*, 5 Bing. N. C. 455; *contra, Bancroft v. Dumas*, 21 Vt. 456. But part payment, to toll the statute, should constitute an acknowledgment of the debt and imply a promise to pay the residue. *Tippett v. Heane*, 1 C. M. & R. 252. Therefore application of a general payment without the debtor's knowledge or consent should not suffice to take a claim out of the statute, as such application cannot identify the payment as one made by the debtor on this specific claim. *Pond v. Williams*, 1 Gray 630; *Miller v. Cinnamon*, 168 Ill. 447. A provision in the South Carolina statute, making part payment equivalent to a promise in writing, does not affect the point raised, as "part payment" in that provision must mean a payment by the debtor on account of the claim sued on. Nothing in the peculiar facts of the principal case justifies the inference that the payment made was

in fact an acknowledgment of the outlawed claims; and failing this there should be no recovery.

**SURETYSHIP—NOTE OF CORPORATION—LIABILITY OF STOCKHOLDERS.**—By a California statute each stockholder in a corporation is individually liable for the debts and liabilities of the corporation in proportion to the amount of stock he owns. A note given by a corporation was paid by a surety, who then sought to enforce the stockholders' liability. *Held*, that he can recover only from those who were stockholders when he paid the note. *Yule v. Bishop*, 65 Pac. Rep. 1094 (Cal., Sup. Ct.).

As is said in the opinion, the statutory liability of a stockholder for the corporate debts arises at the same time as the liability of the corporation. *Larrabee v. Baldwin*, 35 Cal. 155; *Hunt v. Ward*, 99 Cal. 612. Consequently only those who owned stock at the time the corporation incurred liability to the plaintiff can be held. The question then is when the liability of a principal to his surety arises. A promise by the principal to indemnify the surety is implied as soon as the surety is bound, and the liability of the principal therefore arises at once. *Appleton v. Bascom*, 44 Mass. 169; *Elwood v. Deifendorff*, 5 Barb. 398. Moreover it is generally held that a surety who has not had to pay at the time of a conveyance of land by his principal is sufficiently a creditor within the Statute of Elizabeth to have the conveyance set aside subsequently as fraudulent. *Williams v. Banks*, 11 Md. 198; but see *Williams v. Tipton*, 5 Humph. 66. See also *Taylor v. Heriot*, 4 Desauss. 227. It seems, therefore, that those who were stockholders at the time the corporation gave the note were the proper persons to be charged, and that the case is wrongly decided.

**TELEPHONE COMPANIES—DISCRIMINATION—MANDAMUS.**—*Held*, that where a telephone company unreasonably refuses to supply all applicants with similar facilities without discrimination, it may be compelled to do so by *mandamus*. *State v. Citizens' Telephone Co.*, 39 S. E. Rep. 257 (S. C.). See NOTES, p. 309.

**TORTS—RECOVERY FOR DAMAGES RESULTING FROM NERVOUS SHOCK.**—The plaintiff suffered a miscarriage as a result of fright caused by the negligence of the defendant's servant. *Held*, that she can recover for injuries resulting from the miscarriage. *Dulieu v. White*, [1901] 2 K. B. 669. See NOTES, p. 304.

**WILLS—RESIDUARY LEGACY—EXEMPTION FROM LIABILITY FOR DEBTS.**—A testatrix made a residuary legacy to her executrix. By a separate memorandum, not referred to in the will, but signed by the testatrix, and acknowledged by the executrix to create a valid trust, a certain part of the residue was directed to be held in trust for third persons. The remainder of the residue was insufficient to pay the debts of the testatrix. *Held*, that the debts are payable ratably from both portions of the residue. *In re Maddock*, [1901] 2 Ch. 372.

If in a will a clear intent is shown to exempt personal property from its primary liability for debts, this intent will prevail. *Bootle v. Blundell*, 19 Ves. 494 b. A specific legacy is held to indicate such intent. But in the principal case the property in question was not the subject of a specific legacy, for it passed under the residuary clause, and though the trust was specific, this arose outside the will. See *Cullen v. Attorney-General*, L. R. 1 H. L. 190, 198. The will therefore shows no intent to exempt the property. On the other hand the memorandum of the trust seems in itself insufficient to create an exemption. The legatee is bound by it, since it would be fraud to keep for himself property which was given him on the understanding that it would be held for others. *Norris v. Fraser*, L. R. 15 Eq. 318. But there seems no ground for holding that the duties of the executrix as such in paying debts are affected by a paper which is not testamentary nor incorporated in the will by reference. The decision in the principal case, therefore, appears to be correct. *Cf. Cullen v. Attorney-General, supra*.

## BOOKS AND PERIODICALS.

**MONEY PAID UNDER MISTAKE OF FACT.** — The rule that money paid under a mistake of fact may be recovered whenever it would be against conscience for the defendant to retain it, has been vigorously attacked in a recent article. *Money paid under Mistake as to a Collateral Fact.* By Charles Henry Tuttle. 63 Albany L. J. 340 (Sept. 1901). Although this doctrine is almost universally accepted in the form above stated by both courts and text-writers, KEENER, *QUASI-CONT.*, 26, yet the author regards it as a mere appeal to the moral sense of each judge, necessarily resulting in as many conflicting decisions as judges may have variant views of correct moral principles. The science of law is thus converted into the philosophy of ethics. Stability and justice demand, to his mind, that some definite legal rule, based, in so far as is possible, on this moral principle, be adopted. The rule he suggests is that recovery of money paid under a mistake should be allowed where the mistake concerns an intrinsic fact regarding the relations between the plaintiff and the defendant, and denied where it concerns merely an extrinsic or collateral fact.

Mr. Tuttle's characterization of the present doctrine as unworthy the name of a legal rule is hardly justified. In law the rule that all contracts must conform to public policy, and in equity the rules regarding constructive trusts, employ standards fully as indefinite. In deciding what is against conscience a judge must refer, not to his own code of morals, but to that accepted generally by the community. As a result, not only is substantial justice reached, but the decisions have a satisfactory uniformity. Moreover the courts are bound to no defined course, should changed conditions present new phases of old problems. As a substitute for this doctrine, Mr. Tuttle proposes an arbitrary rule. What matters it whether a plaintiff paid money to an undeserving defendant because of a misconception of his relations to such defendant or to a third person? In either case, as the result of a mistake on the plaintiff's part, the defendant has received money for which he has given no return, and this, it is submitted, is the gist of the action. The inequitable results of the suggested doctrine may be illustrated by the following case. The drawee of a gratuitous check, acting under the mistaken belief that he holds funds belonging to the maker, cashes it for the payee. According to this rule the payee could hold the funds against the drawee, merely because the drawee's mistake concerned his relations with the maker, a third person, rather than with the payee. Yet on no principle of justice could the latter defend his position. Mr. Tuttle argues that in this class of cases, the payee having a right revocable by the maker at any time before payment, practically acts as an agent for the maker, and thus, there being only two real parties in interest at the time of payment, the mistaken fact may be treated as intrinsic. But this argument can be regarded only as an attempt to escape from the logical consequences of the author's own doctrine.

It must be admitted that the law would be simplified, and the number of litigated cases lessened, could the courts adopt some more definite rule, substantially embodying the present doctrine. But the rule here advocated, though it may prove fruitful of suggestions, hardly seems to meet the requirement. Moreover, as regards authoritative support, its terminology has been employed by only two judges, and its principle has been contradicted by a number of decisions.

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**ESTOPPEL AS APPLIED TO AGENCY.** — In his recent work on Estoppel Mr. Ewart contended that the responsibility of principals for the contracts of agents acting with apparent authority is to be accounted for, not by the doctrine of agency, but by the law of estoppel. *EWART ON ESTOPPEL*, ch. 26. It has, however, been pointed out that where a third party makes a contract with an agent having apparent authority, the principal is bound whether the party has

knowledge of the usual course of the business in question or not, — whether he is misled by knowledge or by ignorance. But if estoppel is relied on to account for such responsibility, the principal would be liable only in the former case, since there must be a misrepresentation and a reliance thereon. 13 GREEN BAG, 50. In a recent article Mr. Ewart attempts to reinforce his position. *Estoppel by Assisted Misrepresentation*, by John S. Ewart. 35 AM. L. REV. 707 (Sept.-Oct.). The result of his argument is that persons who do not know the facts must succeed, if at all, by proving agency, whereas those who do know the facts may succeed (1) by proof of agency or (2) if there is no agency, then because of the appearance of it, by estoppel. But it is clear, since there is apparent authority, that the same evidence of the previous course of business which is necessary to prove agency in the former case will establish it in the latter, and that in every case of this class it requires the same proof to create an estoppel as it does to establish agency within apparent authority. Thus in the former case the principal's liability can be accounted for only on grounds of agency, whereas in the latter it rests upon agency or estoppel, whichever the third party may choose to invoke. *Pickering v. Bush*, 15 East 38; *Smith v. McGuire*, 3 H. & N. 554. In the second case, therefore, the two grounds, so far from excluding each other, exist side by side. The result is that while agency may be invoked to fix the responsibility of the principal in every case in this class, estoppel may, in a limited class of cases, be called in only to give the plaintiff an additional ground for recovery. If this be a correct definition of Mr. Ewart's final position, no exception to it can be taken. But it is to be noted that he thus makes a distinct limitation on the scope of his theory of estoppel, and confines its function within well recognized and proper limits. To found the principal's liability, however, upon estoppel alone is to disregard not only the doctrine that estoppel is to be invoked only when a just result can be reached in no other way, but also the historical fact that the doctrine of agency was well recognized long before courts began to use the language of estoppel.

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**HANDBOOK OF EQUITY JURISPRUDENCE.** By James W. Eaton. St. Paul: West Publishing Co. Hornbook Series. 1901. pp. xviii, 734. 8vo.

It is a hard task to deal with so large a subject as that of equity jurisdiction in a single volume of the size of the one under consideration. As is said in the publishers' preface, "The chief difficulty arises from the great extent and variety of the subjects involved in the application of equitable doctrines," and this difficulty is apparent throughout. There is no space in which to discuss the rules laid down, and in consequence there is hardly an expression of the author's personal opinion to be found. The main principles are set forth and then various particular instances under each are stated. Every assertion of the author is supported by authorities, of which an enormous number are cited. Quotations from well known text writers also are freely inserted, to illustrate or explain, when they have hit on happy definitions or modes of expression. In this way a clear, concise statement of the law is obtained.

On the other hand, the almost entire lack of discussion makes the book hardly adequate to the needs of the beginner who wishes to acquire a thorough understanding of the subject. For the benefit of such, however, the early chapters treat the origin and history of equity, the general principles governing the exercise of the jurisdiction, and the important maxims. The growth of equity and its relation to law are shortly discussed, and the effect of modern legislation and the adoption of certain equitable principles by the common law courts are considered, in order to enable the reader to understand the true importance and limitations of this jurisdiction. Subsequently the special topics are taken up in

turn, and the bearing of the principles already stated is suggested. Many possible subjects of discussion are necessarily passed over, and in one instance at least the fact that there are two sides to a question is not suggested. Thus, on page 627, it is said that if the invalidity of an alleged cloud on title appears upon the face of the writing, there is no ground for invoking the aid of the court. In support of this assertion several New York cases and one Maine case are cited. No mention, however, is made of the fact that in Texas such a document, if made the ground of an actual claim, will be cancelled, and that in Rhode Island the court will enjoin an execution sale which would be clearly void, in spite of the fact that the deed if executed would on its face be invalid. The ground of such a decree is, of course, that the only effect of the sale and deed can be to diminish the value of the plaintiff's title. *Day Co. v. Texas*, 68 Tex. 526; *Linnell v. Battey*, 17 R. I. 241. Nevertheless, in spite of such slight omissions, the work in hand should be of great service to one not seeking to make a thorough study of the law, but wishing merely to learn how the authorities on a particular point stand, and it is in this way that the book is likely to find its chief field of usefulness.

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THE LAW OF AGENCY. By Ernest W. Huffcutt, Professor of Law in Cornell University. Second Edition. Boston: Little, Brown & Co. 1901. pp. li, 406. 8vo.

Prof. Huffcutt's earlier work on the law of agency has been perhaps appropriately termed a brief treatise or summary. His present work, however, may well be dignified with the title of text-book. It not only contains the earlier work in a carefully revised form, elaborated with whatever is of value in the more recent decisions but it also devotes an entirely new section, comprising about one third of the volume, to the law of master and servant. The author lays stress on the fact that much confusion is due to the failure to distinguish between an agent proper and a servant, and he exemplifies this truth by showing how much more intelligible the law may be rendered by well-correlated headings and subdivisions based on this distinction. Many doctrines in the law of agency are vague and ill-defined, and it is a delight to find an author who in setting forth those doctrines is clear and explicit without allowing himself to yield to the scholar's enthusiasm of indulging in metaphysics. Although the point of view of the work seems rather that of the practising lawyer, than that of the theorist, the treatment of the subject is none the less careful and thorough. One need only to read the section on ratification, or that on the principal's liability for the frauds of his agent, in order to be convinced. The author's discussion of the recent decision of *Keighley v. Durant*, in the House of Lords, may perhaps serve as an example. Almost all of the plausible theories advanced on the different topics of agency are concretely set forth in a clear and readable style. The work is therefore a distinct addition to the literature on this branch of the law, and is to be highly recommended both to the student and practitioner.

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A DIGEST OF THE NEW YORK CODE OF CIVIL PROCEDURE. Being a Synopsis of the Chapters of the Code relating to General Practice. Edited by Charles W. Disbrow. Second Edition. Albany: Matthew Bender. 1901. pp. 151.

The absolute impossibility of a beginner's gaining any clear idea of the principles and provisions of the New York Code from a study of that instrument itself is too well known to need comment. There is thus a ready field for such a work as the present little volume which most admirably fulfils its purpose. As the author says in his brief preface, he has striven to make the law student's way more easy by explaining the difficult and technical passages, and by bringing together in their proper order and in a concise form all the widely separated sections relating to the same subject. This difficult task

Mr. Disbrow has accomplished with signal success. Of course it is possible to pick a few flaws in the work. Some matters might have been elaborated a little more fully, and the value of the book as a practical guide thereby increased. So, too, in a few instances, the author's carefully sought-after brevity tends to mislead the reader. Considering the volume as a whole, however, and in view of the difficulties besetting the task, the writer is certainly to be commended. In the short space of one hundred and fifty pages he has presented an excellent summary of the New York Code; a summary which not only is entirely adequate for the needs of the law student, but also conveys a clear idea of the main principles of this very complex subject. E. S. T.

COMMENTARIES ON THE LAW OF NEGLIGENCE. By Seymour D. Thompson. Vols. I. and II. Indianapolis: The Bowen-Merrill Co. 1901. pp. lvii, 1254; li, 1134. 8vo.

In this work the author intends to treat of negligence in all its relations. Two volumes are now at hand, the first of which contains statements of general principles, together with their common applications, while the second treats of the negligence of Railway and Telegraph Companies. Four volumes are to follow.

In the law of torts it is especially true that many rules of substantive law have been based on forms of procedure now practically obsolete. Moreover, the volume of decided cases has become so enormous, and their results have been so variant, and so largely based on their individual facts, that their mere enumeration affords little assistance towards a uniform statement of principles. In a work of such magnitude as the present it was to be hoped that the author would undertake the task, which most text writers leave untouched, of suggesting some broad, rational principles which would cover ground now broken into separate divisions by petty, irrational distinctions. Such a work might do much to free the courts from subserviency to the results of obsolete forms of procedure, and to guide them to a simpler and more uniform statement of the law. This hope, however, is disappointed by these volumes. The author formulates no guiding principle to run through the entire book, and even in his treatment of the law of specific subjects, except for here and there a keen suggestion, generally contents himself with enumerating conflicting views, as for example where he treats of recovery for mental anguish caused by the negligence of telegraph companies. In the development or simplification of the law, then, the book can have little effect.

On the other hand, the law, as commonly understood, is clearly stated, and many subjects newly brought before the courts are treated. The compilation of authorities is exhaustive, as the author expects to cite at least 35,000 cases before the work is consummated. A large number of cases are concisely abstracted. As the book, therefore, contains such material as is usually embodied both in the ordinary text-book and in the digest, revised in accord with the latest decisions, it should temporarily, at least, be found highly useful for reference.

THE HISTORY OF THE LEGISLATION CONCERNING REAL AND PERSONAL PROPERTY IN ENGLAND DURING THE REIGN OF QUEEN VICTORIA. By J. E. R. de Villiers. Being the Yorke Prize Essay for the year 1900. London: C. J. Clay and Sons. 1901. pp. xix, 236. 12mo.

To produce a work of any material value to other than the casual reader upon such a subject as that of the present essay requires an immense amount of careful and well-directed labor. And at the same time to confine the result within the necessarily narrow limits of a prize essay renders the task infinitely more difficult. Nevertheless it is hardly too much to say that Mr. de Villiers has produced a valuable as well as an exceedingly readable book. The essay, however, is not of importance as presenting any new views or even any previously inac-

cessible material; practically everything to be found in it has been said before, though all has not been so well said. But it is valuable in that it presents clearly and concisely the history of a tremendous struggle, or rather of a series of tremendous struggles. It is difficult to realize the extent of the reforms worked in Real Property and Commercial law during this century, and it is only when one has all these improvements noted together that he can understand how much he owes to the patient and often unrewarded effort of such men as Lord Brougham, Judge Chalmers, and others whose names are less familiar, but who are scarcely less deserving of veneration.

If any adverse criticism can be made upon the present work it is that in that portion dealing with real property the author at times seems to pass from one point to another in a way that is rather confusing to the reader. But the greater part is open to no such objection; on the contrary, it is singularly well arranged. A trifling error is to be found on page 101, where the author states that by the Agricultural Holdings Act, 1883, agricultural machinery is exempt from distress. By section 45 of the Act, however, it appears that only *bona fide* hired agricultural machinery is exempt. On the whole the book is well worth reading.

F. R. T.

THE LAW OF CONTRACTS. By Edward Avery Harriman. Second Edition. Boston: Little, Brown & Co. 1901. pp. liv, 410, 8vo.

As the excellence of this work has been very generally recognized, it is scarcely necessary to do more than note the changes which have been made since the first edition. The size of the book has been considerably enlarged and citations of the recent cases have been added, while duplicate reference has been made to the National Reporter System. The arrangement has been somewhat altered, and the chapters on the nature of contractual obligations and the history of contractual actions transferred to an appendix. A slight change in the author's views as to various doctrines, notably those of the "substantial performance" of conditions and the right of a beneficiary to sue on a contract, are indicated by the following words in the preface: "In the present edition, the importance of logic as tending toward certainty and stability in the law has not been underestimated; but greater liberality has been shown in the treatment of decisions which are the results of those other forces in the law to which logic so readily yields." The faults of the book are those which necessarily flow from an attempt at a complete view of the subject in a very small space. Although many books would not gain by being less concise, yet in this case occasional obscurities might be removed, and a fuller statement of the reasons for the author's opinion on disputed points of theory would be of great interest. It should be said, however, that the book, as it stands, contains considerable discussion of fundamental principles.

A COMPILATION OF THE BAR EXAMINATION QUESTIONS OF THE STATE OF NEW YORK. Edited by Wilson Brice. Albany: Matthew Bender. 1901. pp. 229.

Full half the difficulty — and the terror — of an examination is in not knowing what is to be expected from the examiner. Thus such a book as this present volume is of great aid in preparing for the New York Bar Examinations. Some six hundred actual questions asked within the last five years are given, together with the answers to the same. The answers are not always given outright, for not seldom there is merely a reference to the particular case on which the question is based. This is an excellent plan, since it requires the student to get his knowledge at first hand. The answers which are given in the text, although concisely stated wherever any important principle of law is involved, contain so much of a suggestion of that principle as is necessary to put the reader on the proper track. The Rules for Admission of Attorneys in New York State, and the Rules Regulating Law Examinations are appended. To the student who is preparing for the New York Bar Examination this little volume ought certainly to be a ready help.

E. S. T.



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## MISTAKE IN THE LAW OF TORTS.

THE only rational basis for allowing recovery in tort seems to be blamableness. To allow one man to compel another to make good a loss which the first has suffered, when that other is no more to blame than he, simply transfers the misfortune from one innocent party to another equally innocent. That it was the defendant whose act caused the loss does not alter the case. People must act. One cannot then be considered reprehensible merely because he has acted. Because of this necessary action accidents will happen and losses will occur when neither party is at all in fault. If the law is to do anything in such cases the sensible thing would be to divide the loss equally between the parties concerned. The common law does not do this. The reasons no doubt are historical. In a rude stage of civilization it seemed fairly reasonable to make a man pay for all the damage he had done, and the rule of absolute liability was the result. In getting away from that rule the courts have held that, in this case and that where previously there was liability, there shall be no recovery. As a result, in many cases the party suffering the loss can recover nothing, while in the rest he can hold the defendant liable for all the damage done. Granting that we cannot have a division of misfortune, it is useless simply to shift it unless for good reason. It is better, then, where neither party is to blame, to let the loss lie where it happens to fall.

There is of course nothing new in the above paragraph. The

same ideas have been well expressed again and again.<sup>1</sup> Their good sense has appealed to the judges, and as a result our law of torts has been changed from one of absolute liability to one in which for the most part recovery is based on culpability.<sup>2</sup> Now, it can be safely said that for accidental injury one is not liable.<sup>3</sup> However, in a large class of cases, which may be called cases of mistake, there is no fault on the part of the defendant, just as there is none in cases of accident, and yet recovery is allowed. To call attention to this aspect of such cases this paper is written.

What are cases of mistake? Accident and mistake have been confused occasionally. We can best understand mistake by contrasting it with accident. The terms "intention," "negligence," and "accident," have reference to the *effect* produced by the tortious conduct and not to the conduct itself. Otherwise all torts would be intentional in the sense that the actor's bodily activity is intended.<sup>4</sup> An intentional tort is one in which the wrongdoer actually foresees and intends an effect,<sup>5</sup> which is an injury to the other party. Likewise a negligent tort is one in which the wrongdoer as a prudent man should have foreseen that such an effect was probable enough to warrant foregoing the conduct or guarding against its consequences. The legal idea of accident negatives both intention and negligence. A case of accident then is one where the *effect* was neither intended nor was so probable a result as to make the conduct negligent. On the contrary, in the cases of mistake that arise<sup>6</sup> the *effect* is *intended*, and the error consists in

<sup>1</sup> As in *Brown v. Collins*, 53 N. H. 442 (1873).

<sup>2</sup> Holmes, *Com. Law*, chap. i.-iv.; Wigmore, 7 *HARVARD LAW REVIEW* 315, 383, 441.

<sup>3</sup> Exceptions exist, of which the following may be mentioned: (a) Damage done through violating a statute passed to prevent such damage. *Norton v. Co.*, 113 Mass. 366 (1873). (b) Damage done in committing a seriously wrongful act. *Peterson v. Haffner*, 59 Ind. 130 (1877). (c) Injury to adjoining land by removing support. *Gilmore v. Driscoll*, 122 Mass. 199 (1877). (d) Injury committed by animals when trespassing on realty, or elsewhere when the owner has *scienter*. *Noyes v. Colby*, 30 N. H. 143 (1855); *Reynolds v. Hussey*, 64 N. H. 64 (1886). (e) Injury occasioned by using fire — a possible exception in England not existing in the United States. *Batchelder v. Heagan*, 18 Me. 32 (1840). (f) The *Fletcher v. Rylands* exception, not always followed in the United States. *Marshall v. Wellwood*, 38 N. J. L. 339 (1876).

<sup>4</sup> Holmes, *Com. Law*, 54, 55, 91, 94-95.

<sup>5</sup> If one injurious effect be intended but another accidentally follows, it is not a case of intentional tort. However the actor is liable under one of the exceptions to the accidental rule if the result intended was seriously wrongful. See *ante*, p. 336, note 3 (b).

<sup>6</sup> The writer knows of no case where one committed a negligent tort because of mistake. One shooting at an object near a horse under circumstances showing carelessness as to the safety of the horse, relying for excuse on the fact that he thought the horse his own, would raise the question. No doubt the decision would be the same as if he had intended to kill the horse under the same mistake.



thinking that such an effect is not tortious.<sup>1</sup> To illustrate: one who, knowing his neighbor's line is but ten feet away, cuts down a tree in such a way that under all probable conditions it would fall upon his own land and not on his neighbor's, commits but an accidental trespass if through some improbable defect in tree or soil it actually falls on his neighbor's land. The entry into the land which belonged to his neighbor, which is the injurious effect, was neither intended nor reasonably to be foreseen. But one who thinks he owns all the land which the tree could possibly fall on, and intentionally cuts it so that it falls on land which turns out to be his neighbor's, has committed an intentional trespass under mistake. The falling of the tree upon the land in question was intended under the erroneous notion that such a result would violate no one's right. Again, one who shoots a rifle in a forest in which another's presence is highly improbable will commit an accidental battery if the ball glances and strikes some one who chances to be near by. The contact was not intended and could not reasonably be expected. But if the hunter shoots at a thing which he reasonably supposes to be a bear, but which turns out to be a shepherd's dog, he has committed a trespass to personalty under mistake. The contact was intended under a mistaken idea that it was an injury to no one.<sup>2</sup>

There may be mistakes not of this character. A mistake may show that there was neither intention nor negligence, and so prevent liability. One who does an act under an erroneous notion of the surrounding conditions which will determine what the effect of the act will be, which notion, if true, would make an injurious effect improbable, is not negligent unless careless in entertaining the belief. He did not intend and could not reasonably anticipate the effect which followed. The mistake makes it a case of accident. The authorities as to accident and not those as to mistake govern the case. In the *Nitro-Glycerine Case*<sup>3</sup> the defendants, Wells, Fargo & Co., transported a box from New York to San Francisco. On arrival its contents, appearing like sweet oil, were found leaking. It was taken to the store-room for examination. A servant attempted to open it. The contents, being nitro-glycerine, exploded, destroying much of the plaintiff's property adjoining that used by the express company. Negligence either in receiving the

<sup>1</sup> This language includes both mistakes of law and mistakes of fact. The present discussion, without attempting any very careful discrimination between the two, will be confined to mistakes of fact. The cases make little of the difference, but perhaps because even mistakes of fact do not excuse.

<sup>2</sup> Cases similar to these hypothetical ones are cited later.

<sup>3</sup> 15 Wall. 524 (1872).

box for carriage or in not recognizing the contents, nitro-glycerine being then comparatively unknown, was negatived. If the contents had been sweet oil, as defendants mistakenly supposed, no injury to plaintiff's property would have resulted. There being no negligence in making the mistake, the case was one of accident and the plaintiff failed to recover.<sup>1</sup>

There are other cases where mistake prevents some other element of the tort from being present, and so makes liability impossible. Honest error would often show that so-called "malice" was not present, though not always nor necessarily. One who believed in his cause usually would not be prosecuting maliciously,<sup>2</sup> but he might be. If the occasion of uttering defamation were privileged and the defendant believed his statement true, he would not often be found malicious. In any case where malice is essential this use of mistake would be permissible in defence.<sup>3</sup> In conversion mistake may show that there was no intent to convert at all.<sup>4</sup> In deceit an honest belief in what was said would establish absence of the fraud which is usually held a necessary element of the tort.<sup>5</sup>

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<sup>1</sup> Many cases might be added, but the principle is clear. In the same way a mistake in supposing that no one is in a position to be injured by defendant's act, if non-negligent, makes a case of accident. *Sutton v. Bonnett*, 114 Ind. 243 (1888). If the mistake is negligent there is liability. *Bahel v. Manning*, 70 N. W. 327 (Mich., 1897); *Whitten v. Hartin*, 163 Mass. 39 (1895).

<sup>2</sup> *Davies v. Jenkins*, 11 M. & W. 745 (1843), in which it was held that where, because of identity of names, proceedings had been instituted against the wrong person, an action on the case for malicious prosecution would not lie as the mistake showed lack of malice.

<sup>3</sup> In such cases but for the defendant's mistake he usually would be liable, and one might conclude that it is his *bona fide* error that excuses him. But it is not primarily lack of culpability that creates the defence, but some public policy, such as the desire to have criminals prosecuted, to have bad characters discovered when the interest of the parties makes that proper, and the like. This is clear whenever the error was made negligently. Then there is culpability, and yet the defendant is not held for lack of the showing of malice. Thus these cases cannot fairly be used as authorities on the mistake question. Of course it is arguable that in cases where only non-negligent mistake frees the defendant it is some public policy and not lack of culpability that brings about the result. But it is believed that several of the instances cannot be accounted for on such grounds. (The difference between negligent and non-negligent mistake is noticed on p. 339.)

<sup>4</sup> *Nelson v. Whetmore*, 1 Rich. 318 (S. C., 1845). The defendant mistakenly thought that a negro was free and assisted him to get North. Held, that these facts constitute no conversion, as the defendant, not knowing he was dealing with property, could not be asserting dominion.

<sup>5</sup> *LeLievre v. Gould*, [1893] 1 Q. B. 491. Of course if fraud is required the mistake though negligent prevents liability. If negligent deceit be considered actionable and deceit brought within the general theory of torts, non-negligent belief in the truth of the statement would make out a case of accident, since it would show that damage, which is the injurious effect required, was neither intended nor reasonably to be foreseen.

All such cases equally should not be considered in determining whether mistake excuses what would otherwise be a tort. They show that on other grounds no tort was committed. The cases of mistake which we need to consider, then, are only those where a tort plainly has been committed unless mistake in itself excuses. The question is, does the mistake prevent liability?

At the outset it is to be noticed that the mistake may be made either negligently or non-negligently. A negligent mistake may be defined as one which a prudent man under the circumstances would not make. We should expect to find that a mistake made negligently would not avail a defendant in any way, for only non-negligent mistake is analogous to accident. Such no doubt is the law.<sup>1</sup>

Coming, then, to non-negligent mistake, the cases that have arisen may be noticed, contrasting them with those as to accident.

Concerning torts to the person it must now be conceded that there is no liability for accident, whether the wrong takes the form of assault, battery, or imprisonment.<sup>2</sup> The authorities regarding mistake are by no means so unanimous. On the one hand, we have certain instances where the mistake is held no excuse; on

<sup>1</sup> In those instances where one is held despite even non-negligent mistake the question whether the mistake is negligent or not is immaterial, and so is seldom discussed. *Association v. Rutherford*, 51 Fed. 513 (1893), is, however, a case where the defendant was held for publishing matter, negligently treating it as true, when he would have been equally liable had he non-negligently believed it true. The following cases arose under circumstances where a non-negligent mistake would excuse the defendant, and they hold that a negligent one does not: *Isaacs v. Brand*, 2 Stark. 167 (1817), where an officer arrested one for felony on unreasonable suspicion; *Allen v. Wright*, 8 C. & P. 522 (1838), where a private person arrested the plaintiff for felony on unreasonable suspicion that he committed it; *Carratt v. Morley*, 1 Q. B. 18 (1841), where a judge made a negligent mistake of fact as to jurisdiction; *King v. Franklin*, 1 F. & F. 360 (1858), where a captain unreasonably thought that the plaintiff was engaged in a mutiny; *Hill v. Rogers*, 2 Ia. 67 (1855), *semble*, where the defendant unreasonably thought defence of another necessary; *Murdock v. Ripley*, 35 Me. 472 (1853), where the defendant unreasonably thought excessive force necessary to accomplish an arrest; *State v. Bryson*, Winston, Law (No. 2), 86 (N. C., 1864), where the defendant unreasonably thought he was about to be struck.

<sup>2</sup> As to assault there is perhaps no case in point, except as all cases of battery are in point, since a battery includes an assault; but it is clear that there is no liability because (a) there is no liability even for negligent assault unless damage other than fear or expectation of contact follows, *Kalen v. Ry.*, 47 N. E. 694 (Ind., 1897), and (b) liability for negligent assault, even when physical injury follows the fear, is disputed, *Vict. Ry. Com. v. Coultas*, 13 A. C. 222 (1888); *Spade v. Ry.*, 47 N. E. 88 (Mass., 1897); *Purcell v. Ry.*, 50 N. W. 1034 (Minn., 1892). As to battery, *Stanley v. Powell*, [1891] 1 Q. B. 86, and *Brown v. Kendall*, 6 Cush. 292 (Mass., 1850), settle the law. Cases of accidental imprisonment seem lacking, but no doubt the law is the same. Locking a room which defendant reasonably supposed plaintiff had left would be an example.

the other hand, we have even more numerous sets of circumstances in which the defendant is not held. In the following cases the mistake does not aid the defendant: where an officer with valid process arrests the wrong person,<sup>1</sup> or arrests on process not fair on its face,<sup>2</sup> or commits a battery mistakenly supposing that the plaintiff is unlawfully resisting a levy;<sup>3</sup> where a private person arrests for a felony without warrant when none had been committed;<sup>4</sup> where, without warrant, there is an arrest of one mistakenly supposed to be breaking the peace;<sup>5</sup> where the defendant erroneously supposes that he is defending his property against non-criminal invasion,<sup>6</sup> that he is recapturing his property,<sup>7</sup> or that the plaintiff is a lunatic proper to be imprisoned.<sup>8</sup> But in the following cases the mistake excuses: where an officer supposes one to be subject to arrest who has a privilege;<sup>9</sup> where a private person mistakenly supposes that an officer whom he assists has proper process;<sup>10</sup> where an officer erroneously thinks that the plaintiff is a felon,<sup>11</sup> or where a private person, a felony having actually been committed, makes the same mistake;<sup>12</sup> where the defendant wrongly supposes that the plaintiff is the aggressor in an affray,<sup>13</sup> or that the plaintiff is assaulting him when in fact no attack is being made,<sup>14</sup> or another is the assailant;<sup>15</sup> where the defendant commits

<sup>1</sup> *Coote v. Lighworth*, Moore 457 (1596); *Shadgett v. Clipson*, 8 East 328 (1807); *Hoye v. Bush*, 2 Scott N. R. 86 (1840); *Com. v. Kennard*, 8 Pick. 133 (Mass., 1829), *semble*; *Griswold v. Sedgwick*, 1 Wend. 126 (N. Y., 1828); *Formwalt v. Hylton*, 1 S. W. 376 (Tex., 1886).

<sup>2</sup> *Rafferty v. People*, 69 Ill. 111 (1873); *Com. v. Crotty*, 10 Allen 403 (Mass., 1865).

<sup>3</sup> *Elder v. Morrison*, 10 Wend. 128 (N. Y., 1833); *Brownell v. Durkee*, 79 Wis. 658 (1891).

<sup>4</sup> *Samuel v. Payne*, 1 Doug. 359 (1780).

<sup>5</sup> *Phillips v. Fadden*, 125 Mass. 198 (1878).

<sup>6</sup> *Hall v. Powers*, 12 Met. 482 (Mass., 1847).

<sup>7</sup> *Bowman v. Brown*, 55 Vt. 184 (1882).

<sup>8</sup> *Fletcher v. Fletcher*, 28 L. J. R. (Q. B.) 134 (1859); *Van Deusen v. Newcomer*, 40 Mich. 90 (1879)—where, however, the court was equally divided, and the case was sent back on other grounds.

<sup>9</sup> *Countess of Rutland's case*, 6 Co. 53 (1606); *Cameron v. Bowles*, 2 W. Bl. 1195 (1778); *Tarlton v. Fisher*, 2 Doug. 671 (1781).

<sup>10</sup> *Firestone v. Rice*, 71 Mich. 377 (1888). *Contra* is *Elder v. Morrison*, 10 Wend. 128 (N. Y., 1833).

<sup>11</sup> *Samuel v. Payne*, 1 Doug. 359 (1780); *Doering v. State*, 49 Ind. 56 (1874).

<sup>12</sup> *Mali v. Lord*, 39 N. Y. 381 (1868).

<sup>13</sup> *Timothy v. Simpson*, 1 C. M. & R. 757 (1835).

<sup>14</sup> *Shorter v. People*, 2 N. Y. 193 (1849); *Redd v. State*, 99 Ga. 210 (1896).

<sup>15</sup> *Paxton v. Boyer*, 67 Ill. 132 (1873). In this case the court entirely disregarded the distinction between accident and mistake, and relied solely on accident cases for its decision. *Morris v. Platt*, 32 Conn. 75 (1864), an accident case cited by the court, and *Paxton v. Boyer* itself are also treated as identical by Professor Ames, *Cases on*

a battery on the plaintiff in defence of another person mistakenly thinking that his interference was necessary to repel the plaintiff's assault on such person;<sup>1</sup> where the defendant erroneously supposes he is defending his property against criminal attack;<sup>2</sup> where a parent,<sup>3</sup> teacher,<sup>4</sup> or captain of a vessel<sup>5</sup> thinks that actions which deserve punishment have taken place; where a judge makes a mistake of fact as to his jurisdiction,<sup>6</sup> or a like mistake as to the merits of the case.<sup>7</sup> There are other instances where the question has arisen, but these sufficiently show the clear divergence of holding.

It is believed that no adequate distinction can be drawn between these two lines of cases. The injury inflicted by the defendant may be as great in one as in the other. The chances of mistake seem about equal. When the defendant is protecting himself against supposed injury, there seems some tendency to excuse him because of the mistake when the injury would be very serious, but not otherwise. For example, in the case of supposed battery to his person or criminal entry into his house, he is excused if he attacks the person he thinks a wrong-doer, while he is not in the case of an entry on land if merely a civil wrong. But preventing a dangerous lunatic from causing injury is about the same as preventing an attack on the person, and yet in that case the defendant is held. The distinction between cases where an officer arrests the wrong person and those where he arrests a privileged person is rather shadowy, since he does not have to make the erroneous arrest in either case.<sup>8</sup> Also, why is it

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Torts, 71, n. 4, and Shearman and Redfield, Negligence, i. 16, n. 5. This only shows how very analogous on principle accident and mistake are.

<sup>1</sup> *Hill v. Rogers*, 2 Ia. 67 (1855).

<sup>2</sup> *Smith v. State*, 32 S. E. 851 (Ga., 1899); *Bell v. Martin*, 28 S. W. 108 (Tex., 1893).

<sup>3</sup> *State v. Jones*, 95 N. C. 588 (1866). This is a case where public policy at least aids in creating the defence. Some courts hold malice necessary. *Dean v. State*, 8 So. 38 (Ala., 1890). Others excuse only in case of non-negligent mistake. *Johnson v. State*, 2 Hump. 283 (Tenn., 1837).

<sup>4</sup> *Patterson v. Nutter*, 78 Me. 509 (1886). Some courts here also require malice. *State v. Pendergrass*, 2 D. & B. 365 (N. C., 1837). Others do not. *Lander v. Seaver*, 32 Vt. 114 (1859).

<sup>5</sup> *King v. Franklin*, 1 F. & F. 360 (1858), *semble*.

<sup>6</sup> *Calder v. Halket*, 3 Moo. P. C. 28 (1840).

<sup>7</sup> *Pratt v. Gardner*, 2 Cush. 63 (1848). Here the decisions require malice, and no doubt public policy is responsible. *Kemp v. Neville*, 10 C. B. n. s. 523 (1861). This case and that of parents are hardly authorities for freeing defendant *on the ground of mistake* (see *ante*, p. 338, n. 3), but are stated for completeness. They show that in such cases he is not held.

<sup>8</sup> He may be subject to punishment for contempt if he arrest one privileged, as a suitor going to or returning from court. *Cameron v. Lightfoot*, 2 W. Bl. 1190 (1778); *Magnay v. Burt*, 5 Q. B. 381 (1843). He is not bound to execute process on privileged goods. *Winter v. Miles*, 10 East 578 (1809).

that an officer has such exemption from liability for error when he is acting without warrant, and yet is held so strictly when acting under a warrant? If anything, one would expect more stringency when acting without warrant. Keeping in mind that in all the cases the defendant can be accused of no lack of care, it does seem that a different decision might well have been reached in those instances where he is held liable. No doubt the doctrines that an officer is liable for an arrest not covered by the process, and that a private person cannot justify an arrest for felony without a warrant unless a felony has been committed, are too well established for judicial overthrow. But in other cases where the law is not so clear, the rule that one is not liable in tort unless culpable might well be applied.

The rule as to accident applies to injuries to personalty quite as fully as to wrongs to the person.<sup>1</sup> On the other hand, in cases of mistake the courts almost invariably refuse to free the defendant. He has been held: where he thought he owned the property,<sup>2</sup> or that he had a qualified interest which justified his action;<sup>3</sup> where he had authority from one supposed to be owner;<sup>4</sup> where he was a sheriff levying on wrong goods,<sup>5</sup> or a private party aiding a sheriff

<sup>1</sup> *Wakeman v. Robinson*, 1 Bing. 213 (1823), *semble*; *Goodman v. Taylor*, 5 C. & P. 410 (1832); *The William Lindsay*, L. R. 5 P. C. 338 (1873); *Stainback v. Rae*, 14 How. 532 (U. S., 1852); *R. R. v. Zackary*, 53 S. W. 327 (Ind. T., 1899); *Jackson v. Castle*, 80 Me. 119 (1888); *Dygert v. Bradley*, 8 Wend. 469 (N. Y., 1832). It makes no difference that the wrong is a conversion. *Simmons v. Lillystone*, 8 Ex. 431 (1853).

<sup>2</sup> *Clifton v. Chancellor*, Moore 624 (1600); *Basset v. Maynard*, Cro. Eliz. 819 (1601); *Ford v. Hopkins*, 1 Salk. 284 (1700); *Wilkinson v. King*, 2 Camp. 335 (1809); *Peer v. Humphrey*, 2 A. & E. 495 (1835); *Walker v. Matthews*, 8 Q. B. Div. 109 (1881); *Hobart v. Hagget*, 3 Fairf. 67 (Me., 1835); *Stanley v. Gaylord*, 1 Cush. 536 (Mass., 1848), *semble*; *Gray v. Stevens*, 25 Vt. 1 (1855); *Dexter v. Cole*, 6 Wis. 319 (1858); *Hazleton v. Week*, 49 Wis. 661 (1880). In Indiana, New York, and possibly elsewhere, a peculiar rule prevails holding that a *bona fide* purchase is not a conversion. *Valentine v. Duff*, 34 N. E. 453 (Ind., 1893); *Gillet v. Roberts*, 57 N. Y. 33 (1874). But even in those jurisdictions other acts as owner, though done *bona fide*, make one liable. *Pease v. Smith*, 61 N. Y. 477 (1875).

<sup>3</sup> *Hartop v. Hoare*, Str. 1187 (1743); *Hoare v. Parker*, 2 T. R. 376 (1788), the court thinking that the rule was erroneous; *M'Combie v. Davies*, 6 East 538 (1805); *Soc. v. Bank*, 17 Q. B. Div. 705 (1886); *Stanley v. Gaylord*, 1 Cush. 536 (Mass., 1848). *Contra* are *Spackman v. Foster*, 11 Q. B. Div. 99 (1883); *Leuthold v. Fairchild*, 27 N. W. 503 (Minn., 1886).

<sup>4</sup> *Stephens v. Elwall*, 4 M. & S. 259 (1815); *Featherstonhaugh v. Johnston*, 8 Taun. 237 (1818); *Hior v. Bott*, L. R. 9 Ex. 86 (1874); *Co. v. Curtis*, [1892] 1 Q. B. 495; *Higginson v. York*, 5 Mass. 341 (1809); *Donahue v. Shippee*, 15 R. I. 453 (1887).

<sup>5</sup> *Cremer v. Humbertson*, 2 Keb. 352 (1669); *Glasspoole v. Young*, 9 B. & C. 696 (1829); *Davies v. Jenkins*, 11 M. & W. 745 (1843) *semble*; *North v. Peters*, 138 U. S. 271 (1891); *Breichman v. Ross*, 67 Cal. 601 (1885); *Miller v. Bannister*, 109 Mass.

in so doing,<sup>1</sup> or a subordinate public officer acting under orders from his superior;<sup>2</sup> where he and other assignees in bankruptcy seized property not belonging to the bankrupt;<sup>3</sup> where he thought he was justified for the purpose of protecting the property;<sup>4</sup> where he thought the property wild game.<sup>5</sup> On the other hand, he has been excused: where he was an officer levying on property privileged from execution;<sup>6</sup> where he dealt with property under a statute concerning lost property and the property in question proved to be merely hidden;<sup>7</sup> where he was a judge making a mistake of fact as to jurisdiction,<sup>8</sup> or merits.<sup>9</sup>

There is little room for argument in the face of such an overwhelming weight of authority. It is important to notice that the contrary might have been held, and yet the rule that the owner may follow his property maintained. It is conceivable that the law should allow the owner to regain his property, and yet that he should have no action for damages against any one who had dealt with it in the non-negligent belief that he was acting rightfully. Without attempting, then, to combat the doctrine of *caveat emptor*, the question whether liability in tort should be allowed may be considered. Certainly about all that can be said for the doctrine is said by Chief Justice Holmes in the Common Law.<sup>10</sup> He says (a) that the case differs from that of accident, since here the defendant intended the injury. That is true,<sup>11</sup> but seems to make no difference in principle except so far as it makes his further arguments possible. He himself admits this. If liability in tort depends on choosing conduct which will surely or probably lead to

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289 (1872); *Cook v. Hopper*, 23 Mich. 511 (1871); *Rogers v. Weir*, 34 N. Y. 465 (1866).

<sup>1</sup> *Oystead v. Shed*, 12 Mass. 505 (1815). In *Johnson v. Stone*, 40 N. H. 197 (1860), it was held that one who took property, thinking that the sheriff had levied on it when he had not, was liable, though the sheriff commanded the taking. Concerning *Oystead v. Shed*, it may be said that as to arrests under similar circumstances there is considerable authority which is contrary in principle. See *ante*, p. 340, n. 10.

<sup>2</sup> *Tracy v. Swartwout*, 10 Pet. 80 (U. S., 1836).

<sup>3</sup> *Atkinson v. Maling*, 2 T. R. 462 (1788); *Summersett v. Jarvis*, 3 Brod. & B. 2 (1821); *Benton v. Hughes*, 2 Bing. 173 (1824).

<sup>4</sup> *Kirk v. Gregory*, 1 Ex. Div. 55 (1876).

<sup>5</sup> *Ranson v. Kitner*, 31 Ill. Ap. 241 (1888).

<sup>6</sup> *State v. Morgan*, 3 Ired. L. 186 (N. C., 1842).

<sup>7</sup> *Sovern v. Yoran*, 16 Ore. 269 (1888). Here the defendant seems to have been mistaken as to the legal meaning of the word "lost." See *ante*, p. 337, n. 1.

<sup>8</sup> *Pike v. Carter*, 3 Bing. 78 (1825).

<sup>9</sup> *Moor v. Ames*, 3 Caines 170 (N. Y., 1805). See *ante*, p. 341, n. 7.

<sup>10</sup> Pp. 96-100.

<sup>11</sup> As has already been pointed out, *ante*, pp. 336, 337.

enrichment.<sup>1</sup> If by the defendant's use the article has been consumed, the same arguments apply. The benefit he has gained by such use may be detained by him without unfairness, since having paid for the article he is not unjustly enriched, for what he has gained by its use is balanced by the price he paid. If instead of having gained the benefit himself, he is merely an agent, say an auctioneer, and has turned over the proceeds to his principal, his exemption is if anything still clearer, as there he gets no benefit from the sale even in appearance. (f) It is next suggested that in early days, when this doctrine arose, the state of one's mind was hard to prove because of exclusion of witnesses on the ground of interest. That may have helped to excuse the rule in its infancy, but cannot warrant its continuance now that questions of one's intentions are passed on every day. (g) In the light of what has been stated it seems untrue to say that, "The objections to such a decision as supposed in the case of an auctioneer do not rest on the general theory of liability, but spring altogether from the special exigencies of commerce."<sup>2</sup> The objection is that such a decision does violate the theory that liability is based on blamableness. If the lack of culpability will relieve one from responsibility for accidental injury, it should also relieve where injury is caused under non-negligent mistake. The exigencies of commerce but make the rule work greater injustice.<sup>3</sup>

Sir Frederick Pollock, in the first chapter of his treatise on Torts, calls attention to the anomalous character of the rule we have been considering and accounts for it as a result of an early confusion of actions merely to recover property with actions to redress wrongs. The latter being more simple in procedure were sought by suitors desiring merely vindication of property rights, and the courts, without noticing that giving redress as for a wrong was an entirely different thing from merely allowing the owner to regain his property, permitted the innovation.<sup>4</sup> Whatever the origin of the rule, it certainly is now an anomaly. In the Factors

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<sup>1</sup> But this liability, like that of admitting title after a technical trespass, would have no basis in tort proper.

<sup>2</sup> Common Law, p. 100.

<sup>3</sup> Since general principles are not followed, the burden is on those who support the exception. There seems to be no policy in holding the defendant here that could not be urged with equal force in cases of accident. That such a rule leads to greater care being used, that it avoids the difficulty of proving negligence when really present, that it prevents negligent defendants escaping through error or prejudice of juries, these might all be relied on in cases of accident, and have no greater weight here.

<sup>4</sup> It would be worth while if this could be verified in the early reports.



Acts we see some tendency to get away from it in the hardest cases.<sup>1</sup> While we cannot hope for its entire abolition, we may hope that if its anomalous character were once fully understood it would not be used as furnishing a guiding principle for the decision of analogous cases. In many cases of injuries to the person, we have seen that the principle is not applied. Unfortunately they furnish about the only argument from precedent against the rule.<sup>2</sup>

If we turn from injuries to personalty to injuries to realty, about the same condition of the law confronts us. As everywhere else there is no liability for accident.<sup>3</sup> But in the cases of mistake that have arisen the defendant is held responsible. Such was the decision: where he thought he owned the land,<sup>4</sup> where he mistook the boundary and so trespassed,<sup>5</sup> where he thought he had a right

<sup>1</sup> The Factors Acts of course not only overthrow the mistake rule so far as they go, but also pass the title to the innocent party. Whether that is desirable depends on different principles. In an action to recover the property the defendant is not sued for doing wrong, but is merely asked to give up that to which he has gotten no title.

<sup>2</sup> It is not without weight to notice that the new German Civil Code, secs. 932-936, protects a *bona fide* purchaser from liability, and even gives him title except where the goods were stolen from or lost by the owner. One taking *bona fide* but not for value is liable only so far as he is unjustly enriched, sec. 816. Freund, 13 HARVARD LAW REVIEW 634. The Code Napoléon, Art. 2279, adopts the view taken in this article exactly, making no exception as to lost or stolen property.

Also, cases of conversion under non-negligent mistake in which the damages are measured by the value of the property to the plaintiff in the condition he had it in, while if the mistake is negligent or the wrong wilful greater damages are allowed, show a tendency in the right direction. *Wood v. Morewood*, 3 Q. B. 440, n. (1841); *Lake Shore & Michigan Southern R. R. Co. v. Hutchins*, 32 Oh. St. 571 (1877). *Contra*, *Woodenware Co. v. U. S.*, 106 U. S. 432 (1882). The true view would be to make an innocent defendant liable only so far as he is enriched by his acts, while a blamable defendant should be held only for actual damage done.

<sup>3</sup> The Nitro-Glycerine Case, 15 Wall. 524 (U. S., 1872); *Blyth v. Co.*, 11 Ex. 781 (1856); *Sheldon v. Sherman*, 42 N. Y. 484 (1870); *Field v. N. Y. Cent. Ry.*, 32 N. Y. 339 (1865); the numerous other cases of fire, water, explosives, and the like injuring realty could be added. No sound distinction can be drawn between direct and indirect injury as to this question, whether the injury is to realty or personalty, person or other rights. Holmes, Com. Law, 80. The Nitro-Glycerine Case is clearly one of direct injury. A still plainer case would arise if one walking on a sidewalk were to trip on a loose plank, which, however, appeared firm, and were thus to fall into plaintiff's store window. Surely there would be no liability for the resulting damage. *Newsome v. Anderson*, 2 Ired. L. 42 (N. C., 1844), holding one liable for accidental trespass to realty, seems wrong.

<sup>4</sup> *Anon.* Y. B. 21 & 22 Edw. I. 206 (1293); *Dougherty v. Stepp*, 1 D. & B. 371 (N. C., 1835).

<sup>5</sup> *Basely v. Clarkson*, 3 Lev. 37 (1681); *Reynolds v. Edwards*, 6 T. R. 11 (1794); *Jeffries v. Hargus*, 6 S. W. 328 (Ark. 1887). *Russell v. Irby*, 13 Ala. 131 (1847) *Contra*.

of common,<sup>1</sup> where he had a license from one he thought owner,<sup>2</sup> where as an officer he entered the wrong land to levy an attachment,<sup>3</sup> where he entered under void process,<sup>4</sup> where he had authority from one he thought competent to give it,<sup>5</sup> where he entered to retake goods which he erroneously thought were his and wrongfully taken by the owner of the land.<sup>6</sup> No doubt in some cases defendants who had injured realty under a non-negligent mistake would be excused. Judicial officers causing injury to realty through mistaken judgment would be an example.<sup>7</sup> But clearly in the absence of special reasons for exemption the defendant is held liable. The reasons against such a ruling are identical with those against a like ruling as to personalty and need not be repeated. So far as the law is settled we can hardly hope for change, but the anomaly should not be extended to instances where the rule is not clearly established.

Another field in which the rules we have been noticing have a frequent operation is found in defamation. Here, in distinguishing between accident and mistake, one must keep in mind that the effect which is tortious is *touching* the reputation, if one may use a word which expresses the analogy to battery. The reputation is the thing which is injured. Therefore a case is one of accident when the defendant did not intend and could not reasonably foresee that the plaintiff's reputation would be affected if his (defendant's) words were believed. Accordingly in the following instances the defamation would be accidental and there should not be, and no doubt there is not, any liability: where the defendant does not intend and cannot foresee that the defamatory matter will be heard, read, or understood by a third party at all,<sup>8</sup> where the de-

<sup>1</sup> *Arche v. de Spolte*, Y. B. 11 & 12 Edw. III. 184 (1337). No discussion at all.

<sup>2</sup> *Allison v. Little*, 5 So. 221 (Ala., 1889), the court, however, treating defendant as negligent; *Lowenburg v. Rosenthal*, 22 Pac. 601 (Ore., 1889), where the jury expressly found defendant non-negligent; *Herdic v. Young*, 55 Pa. St. 176 (1867); *Huling v. Henderson*, 29 At. 276 (Pa., 1894); *Webber v. Quaw*, 49 N. W. 830 (Wis., 1879); *Hazleton v. Week*, 49 Wis. 661 (1880).

<sup>3</sup> *Cole v. Hindson*, 6 T. R. 234 (1795); *Rowe v. Bradley*, 12 Cal. 226 (1859).

<sup>4</sup> *Rideware v. Sorde*, Y. B. 11 & 12 Edw. III. 500 (1338); *Anon.* Y. B. 11 & 12 Edw. III. 516 (1338).

<sup>5</sup> *Cubit v. O'Dett*, 16 N. W. 679 (Mich., 1883); *Coventry v. Barton*, 17 Johns. 142 (N. Y., 1819).

<sup>6</sup> *Chambers v. Bedell*, 2 W. & S. 225 (Pa. 1841).

<sup>7</sup> Though no case as to injuries to realty was found by a very incomplete search, yet without question judges would be exempt in such a case as in others. So one aiding an officer at his command might be held excused. So no doubt in other exceptional cases.

<sup>8</sup> A case where accident was proven was not found. Suppose one on retiring at night

fendant reasonably thinks the matter published is something else,<sup>1</sup> where he publishes it not knowing what it is under circumstances making such action non-negligent,<sup>2</sup> where he knows what is published, but reasonably believes that it will not be understood as defamatory.<sup>3</sup> But in the instances of mistake that have arisen the defendant has almost always been held. Such was the decision: where defendant believed the imputation true,<sup>4</sup> where he published it of the wrong party,<sup>5</sup> where he was mistaken in thinking himself under a duty to publish which would create a privilege,<sup>6</sup> where he erred as to the person to whom publication would be privileged.<sup>7</sup>

The cases of privilege in which mistake shows absence of malice are not discussed here for reasons already stated.<sup>8</sup> In cases of

should give vent to his opinions and a burglar in hiding overhear him. Where the defendant is negligent he is liable. *Pullman v. Hill*, [1891] 1 Q. B. 524; *Allen v. Northam*, 13 S. W. 73 (Ky., 1890). In the last case the point was not discussed and negligence did not affirmatively appear; if not present the case seems erroneous.

<sup>1</sup> *King v. Paine*, 5 Mod. 167 (1696). A criminal case is not very good authority on this point, but this is cited by Clerk & Lindsell, *Torts*, 2d ed. 492, as law. A contrary view is expressed by the editor of the reports in 4 M. & R. 312, note, but seems the less satisfactory view. If negligence is present, liability is clear. *Shepherd v. Whitaker*, L. R. 10 C. P. 502 (1875); *Loibl v. Breidenbach*, 47 N. W. 15 (Wis., 1890). *Thompson v. Dashwood*, 11 Q. B. D. 43 (1883), *contra*, was expressly disapproved of in *Hebditch v. McIlwaine*, [1894] 2 Q. B. 54.

<sup>2</sup> *Chubb v. Flanagan*, 6 C. & P. 431 (1834); *Day v. Bream*, 2 Moo. & R. 54 (1837); *Emmens v. Pottle*, 16 Q. B. D. 354 (1885); *Queen v. Munsalow*, [1895] 1 Q. B. 765, *semble*, in which Wills, J., rightly calls it a case of accidental publication. *Rex v. Clerk*, 1 Barn. 304 (1729), *contra*, being a criminal case, is doubly bad. If negligence appears, defendant is of course liable. *Vitzetelly v. Library*, [1900] 2 Q. B. 170; *Com. v. Morgan*, 107 Mass. 204 (1871), *semble*.

<sup>3</sup> *Smith v. Ashley*, 11 Met. 367 (Mass., 1846); *Nye v. Co.*, 104 Fed. 628 (Dist. Minn., 1900). But if negligence is present, defendant is liable. *Hankinson v. Bilby*, 16 M. & W. 442 (1847); *Curtis v. Massey*, 6 Gray 261 (Mass. 1856); *Peterson v. Co.*, 65 Minn. 18 (1896).

<sup>4</sup> *Wilson v. Fitch*, 41 Cal. 379 (1871); *Burt v. Co.*, 28 N. E. 1 (Mass., 1891); *King v. Root*, 4 Wend. 113 (N. Y., 1829). In *Duncan v. Thwaites*, 5 Dow & R. 462 (1824), the court during argument suggested that such is the law.

<sup>5</sup> *Brett v. Watson*, 20 W. R. 723 (1872); *Hanson v. Co.*, 34 N. E. 462 (Mass., 1893), all the justices agreeing that mistake would not excuse, the difference being as to whether plaintiff was indicated or not; *Davis v. Marxhauser*, 49 N. W. 50 (Mich., 1891); *Alliger v. Eagle*, 6 N. Y. Supp. 110 (1889); *Griber v. Co.*, 14 N. Y. Supp. 848 (1891); *McClellan v. Co.*, 19 N. Y. Supp. 262 (1892).

<sup>6</sup> *Stuart v. Bell*, [1891] 2 Q. B. 349, 356, 358, *semble*.

<sup>7</sup> *Hebditch v. McIlwaine*, [1894] 2 Q. B. 54. The statements to the contrary in *Waring v. McCaldin, Jr.* R. 7 C. L. 282, 288 (1873), and *Jenoure v. Delmege*, [1891] A. C. 73, must be considered erroneous. This instance, and that of the preceding note, may be considered as mistakes of law. No distinction was taken on that ground, however.

<sup>8</sup> See *ante*, p. 338, n. 3.

that character the defendant is freed not because of lack of culpability, but on grounds of public policy. It is believed that the application to defamation of the rule that non-negligent mistake does not prevent liability is open to criticism. It is a matter of recent development and the law can hardly be considered settled. In the case of a mistake as to the truth of the defamation, the defendant may well be held. The defence of truth is based rather on the bad standing of the plaintiff than on the meritorious nature of the defendant's act. The defendant is really in fault, though truth be found, but the plaintiff is in no position to complain of the wrong. That the defendant thought the plaintiff would not be able to sue him successfully should not excuse him. But in the other cases the defendant's conduct may be most laudable morally and no blamableness imputable to him, and yet he may be held. That seems of doubtful propriety.

Other instances of decisions concerning the mistake rule are isolated and need not be discussed.<sup>1</sup> We may notice, however, the effect upon the question when the plaintiff causes the mistake. The plaintiff may have caused the mistake intentionally, negligently, or innocently. If he caused it intentionally it would seem clear that he could not recover even though the defendant was negligent in being misled. The courts as usual do not distinguish between negligent and non-negligent mistake on the defendant's part, but relieve him where the plaintiff intentionally misled him, without regard to whether he was negligent or not.<sup>2</sup> Where the plaintiff caused the defendant's error through negligence the same result should follow. If the defendant was negligent, too, the theory of contributory negligence would bar the plaintiff.<sup>3</sup> If the defendant was not negligent the plaintiff is clearly more in the

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<sup>1</sup> For example, *Bond v. Chapin*, 8 Met. 31 (Mass., 1844), holding the defendant; *Le Court v. Gaster*, 23 So. 463 (La., 1898), freeing him.

<sup>2</sup> *Mace v. Cadell*, Cowper, 232 (1774), apparently going too far; *Price v. Harwood*, 3 Camp. 108 (1812); *Morgan v. Brydges*, 1 B. & Al. 650 (1818), *semble*; *Dunston v. Patterson*, 2 C. B. N. S. 495 (1857), *semble*; *Fletcher v. Fletcher*, 28 L. J. R. (Q. B.) 134 (1859), *semble*. The following early cases are *contra*: *Coote v. Lighthorn*, F. Moore 457 (1596); *Thurbane & Al. Hardres*, 323 (1664); *Colwill v. Reeves*, 2 Camp. 575 (1811).

<sup>3</sup> Cases like *Clark v. Brown*, 116 Mass. 504 (1875), holding defendant liable for defamation though plaintiff negligently led him to believe the matter true, are not in opposition since they rest on a different principle explained, *ante*, p. 349. The defendant is not blameless where he defames another even though he thought he was speaking truth. In fact, he is intentionally and knowingly doing wrong. The plaintiff can therefore recover, though he contributed to defendant's error, except possibly where he intentionally induced the defamation.

wrong. The cases free the defendant.<sup>1</sup> If the plaintiff innocently brought about the error and the defendant was negligent, clearly the latter would be liable.<sup>2</sup> If both parties are free from fault, the defendant should not be held on the general theory that he is not to blame and the additional point that if he is to blame the plaintiff is equally so. The cases are hardly conclusive.<sup>3</sup> Of course if the injury is continued after discovery of the error the defendant is liable, no matter how much the plaintiff was to blame originally.<sup>4</sup> Also, if the defendant is unjustly enriched by his action he must reimburse the plaintiff to that extent, though not liable in tort.<sup>5</sup>

No doubt some will think it useless to argue against a principle that has such a weight of authority back of it as the one under consideration. It must be admitted that in certain instances the law is settled and that there is a strong tendency to apply the rule used in those cases to others that arise. To such as think it impossible to prevent the spread of the rule, what has been said may at least call attention to the following facts: (a) that it is an anomaly inconsistent with the law as to accident, (b) that while there are individual sets of fact in which it is not applied, yet it spreads throughout the law of torts and is not confined in its operation to cases of injury to property,<sup>6</sup> (c) that the line between absolute liability and liability only for blamableness, so far as it exists, is not drawn between trespass and case or direct and

<sup>1</sup> *Crawford v. Satchwell*, 2 Strange 1218 (1745); but this case and others following it may rest on the ground that the real defendant cannot take advantage of a misnomer except by a proper plea; *Hills v. Snell*, 104 Mass. 173 (1870); *Parker v. Walrod*, 16 Wend. 514 (N. Y. 1836). *Dawson v. Wood*, 3 Taun. 256 (1810), in which the language used is broad enough to be *contra*, is supportable as a case of trespass *ab initio*, since the officers detained the goods after learning of the mistake.

<sup>2</sup> *Moore v. Bowman*, 47 N. H. 494 (1867).

<sup>3</sup> See *Glasspoole v. Young*, 9 B. & C. 696 (1829); *Fletcher v. Fletcher*, 28 L. J. R. (Q. B.) 134 (1859), where the defendants were held; *Ryder v. Hathaway*, 21 Pick. 298 (Mass., 1838), where the defendant was not held; *Chapman v. Cole*, 12 Gray 141 (Mass., 1858); *Pearson v. Inlow*, 20 Mo. 322 (1855); *Hays v. Creery*, 60 Tex. 445 (1883); *Formwalt v. Hylton*, 1 S. W. 376 (Tex., 1886).

<sup>4</sup> *Dunston v. Patterson*, 2 C. B. N. s. 495 (1857); *Chapman v. Cole*, 12 Gray 141 (Mass., 1858); *Hills v. Snell*, 104 Mass. 173 (1870), *semble*; *Moore v. Bowman*, 47 N. H. 494 (1867); *Parker v. Walrod*, 16 Wend. 514 (N. Y., 1836), *semble*.

<sup>5</sup> *Pearson v. Inlow*, 20 Mo. 322 (1855). The court gave the value of the property taken, probably as measuring the plaintiff's actual loss; but the defendant's enrichment should be the measure of damages. Compare the German law in the case of taking property *bona fide* but without consideration, *ante*, p. 347, note 2.

<sup>6</sup> Both Chief Justice Holmes and Sir Frederick Pollock discuss the matter in places already cited as if so limited. Of course its most conspicuous illustrations are found in such cases and in those of ministerial officers erring in the course of their duties.

indirect injury, but between accident and mistake.<sup>1</sup> In the case of accident the theory of culpability is applied; in the case of mistake the defendant is usually held to act at his peril.

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<sup>1</sup> Statements that as to trespasses and nuisances want of care is immaterial are essentially misleading. One is ordinarily not liable for injuries to realty unless negligent, *ante*, p. 347, n. 3. That only direct injuries to realty are called trespasses, and that these are usually intentional by no means shows that one is liable for accidental trespasses or nuisances. *Cf.* Jaggard, *Torts*, 747.

## PUBLIC SERVICE COMPANY RATES AND THE FOURTEENTH AMENDMENT. II.

### III.

**I**F the enforcement of any state law or administrative order establishing a schedule of rates or prices will violate the constitutional rights of any person or corporation secured by the Fourteenth Amendment, then the only effective and probably the only permissible remedy is by bill in equity against the board or commission that made the order and against the state officials charged with its enforcement.

The elementary and underlying ground of equity jurisdiction from which the special jurisdiction in this class of cases has been developed is the absence of any plain, adequate, and complete remedy at law for the invasion of a clear legal right.<sup>1</sup>

It is clear that no remedy afforded by the common law can be "complete, practical, or efficient" in the class of cases with which we are dealing.

It has been customary in some of the Western states to give in the statute establishing or authorizing the establishment of railroad rates actions at law to shippers for damages and penalties against railroads in respect of each refusal to accept or to transport goods at the statutory rate. Thus the transactions of a single day may give rise to a thousand suits. And the same result would follow even in the absence of such special statutory grants of actions. Again, it is common knowledge that the only practical way for a gas, water, transportation, or similar company to collect its bills is

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<sup>1</sup> *Bispham, Equity*, 6th ed., 26, 533, 553; *Boyce's Ex. v. Grundy*, 3 Pet. 210; *Watson v. Sutherland*, 5 Wall. 74; *Allen v. B. & O. R. R.*, 114 U. S. 311, 316; *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 515; *Gormley v. Clark*, 134 U. S. 338, 339. The fact that the complainant in equity may have a legal action to redress the wrong, or a legal defence to the respondent's threatened action, is not of itself sufficient to render the complainant's legal remedy, whether by action or defence, either adequate or complete. *Boyce's Ex. v. Grundy*, 3 Pet. 210; *Insurance Co. v. Bailey*, 13 Wall. 616, 621; *St. Louis, etc., v. Indianapolis, etc., Ry.*, 9 Bliss 99; *Gormley v. Clark*, 134 U. S. 338, 349; *Kilbourn v. Sunderland*, 130 U. S. 505, 514; *Tyler v. Savage*, 143 U. S. 79, 95; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1. As stated by the court in the *Walla Walla* case, 172 U. S. at p. 12, in order to defeat the jurisdiction of a court in equity, the remedy at law must be as "complete, practical, and efficient as the remedy in equity."

to see that they are paid either in cash at the time the service is rendered (as in the case of transportation and telegraph companies) or from month to month (as in the case of gas and water companies). To let them run on, pending litigation, would be to lose a large part of them altogether. The prompt collection of current bills is an essential condition of the successful prosecution of such a business as that of furnishing gas, water, and similar commodities. After the consumer has moved, collection is, in many cases, impossible; and to postpone the payment of hundreds or thousands of such bills until the termination of the several law suits respecting them would thus necessarily result in certain loss to the company, even if the final decision should be favorable to it. And, besides the multiplicity of suits which would arise, and the consequent irreparable damage to the complainant through impossibility of collection, there is no certainty that the result of a jury trial would be the same in all the cases. The company might be successful in some and lose in others. To resort to the expedient of shutting off the supply (as in the case of gas or electricity) if the consumers refuse to pay the company's price, would not improve the situation; for the result would be an equal number of law suits in which the company would be defendant instead of plaintiff, and a heavy loss in consumption.<sup>1</sup> Thus in every such case the legal remedy appears to produce a multiplicity of suits, or irreparable damage, and generally both.<sup>2</sup>

It is, however, when we consider the nature of the only way in which the invalidity of a schedule of rates can be made to appear that the inadequacy and impracticability of all legal remedies become most striking. There can rarely if ever be anything in the language or on the face of a statute or administrative order establishing a schedule of rates from which it can be seen that the rates are unreasonably low or that anybody's constitutional rights will be violated by its enforcement. It is only in the application of the schedule to particular cases and from facts outside the law and

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<sup>1</sup> It hardly needs to be said that the avoidance of a multiplicity of suits is a valid reason for resorting to a court of equity, in which the issue can be litigated and disposed of once for all. 1 *Foster's Federal Practice*, sect. 209; *Union Pacific R. R. v. Cheyenne*, 113 U. S. 516; *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429; *Cruikshank v. Bidwell*, 176 U. S. 73; *Ogden City v. Armstrong*, 168 U. S. 224; *Smyth v. Ames*, 169 U. S. 466; *Sanford v. Poe*, 16 C. C. A. 305; *Taylor v. Louisville & N. R. R.*, 31 C. C. A. 537.

<sup>2</sup> For a case to restrain the collection of an alleged unconstitutional tax, where there was federal jurisdiction but no equity jurisdiction because the remedy at law was adequate, see *Shelton v. Platt*, 139 U. S. 591.



outside the schedule that the violation of the Fourteenth Amendment can be made to appear. And those facts are of a kind to be established mainly by the testimony of experts and the most careful, complicated, and elaborate investigation of a mass of data generally technical and difficult to understand. The ends of justice and of public policy would not be served by permitting evidence of this character to be submitted to juries in one suit or many suits. Moreover, the state officials charged with the direct enforcement against the company of the statute or order would not respect and could not be expected to regard such judgments as morally or legally binding upon them in cases to which they were not parties and could not offer the evidence favorable to the constitutional validity of the statute or order.

It is such considerations as these that have led to several intimations by the courts that statutes and administrative orders establishing rates are *prima facie* valid and cannot be attacked in proceedings to which the officials who made them and those charged with their enforcement are not parties. If this is true, then there is no longer any question of the inadequacy or incompleteness of the legal remedy, for there is no legal remedy at all<sup>1</sup> as between the company and its customers.

For these several reasons — either because a bill in equity is the only remedy open to the complainant, or because to confine the complainant to its remedy at law would be to work irreparable damage to it, or would lead to a multiplicity of suits — it is well settled that a public service corporation can resort to a court of equity to test the validity under the Fourteenth Amendment of an act or order of a state legislature or its agents fixing the price of the commodities in which it deals or the charge for the service it renders, and that upon motion supported by satisfactory affidavits (accompanied, generally, by a bond) the enforcement of the order will be enjoined *pendente lite*.

#### I. THE SUPREME COURT CASES.

Of the six cases in the United States Supreme Court in which a state rate has been declared invalid, three<sup>2</sup> were proceedings, either by bill in equity, or by petition for a writ of mandamus by

<sup>1</sup> Chicago, etc., R. R. Co. v. Minnesota, 134 U. S. 418, 460; Covington Turnpike Co. v. Sanford, 164 U. S. 578; Lake Shore, etc., R. R. Co. v. Smith, 173 U. S. 684; Haverhill Gas Light Co. v. Barker *et al.*, 109 Fed. Rep. 694.

<sup>2</sup> Chicago, M. & St. Paul R. R. v. Minnesota, 134 U. S. 418; Covington Turnpike Co. v. Sanford, 164 U. S. 578; Lake Shore & M. S. R. R. v. Smith, 173 U. S. 684.

state officers against the company. The remaining three cases<sup>1</sup> were bills in equity by the company or the holders of its securities against the state officers charged with the making or enforcement of the act.

In the case in *Chicago, M. & St. P. R. R. v. Minnesota*,<sup>2</sup> Mr. Justice Miller says that, until the judiciary has been asked to declare the regulations void, the tariff so fixed is the law, and must be submitted to both by the carrier and the party with whom he deals, and adds : —

"The proper and only mode of relief is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States. . . .

"Until this is done, it is not competent for each individual having dealings with the company, or the company itself, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

He says that a petition for a writ of mandamus against the company is an equally appropriate mode of trial ; but this remedy can of course only be sought by the state.

So in *St. Louis & S. F. R. R. v. Gill*,<sup>3</sup> Mr. Justice Shiras, speaking for the court, inclines to the view that the justice of a state rate, made by commissioners, can be inquired into only in cases in which the state is represented by the commissioners or the attorney-general, and not in collateral proceedings.

"In such cases the course recommended by Mr. Justice Miller may well be followed : that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected."

In *Smyth v. Ames*,<sup>4</sup> Mr. Justice Harlan, speaking for the court, says : —

"The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law ; for a court of law could only deal with each separate transaction involving the rates to be charged for transporta-

<sup>1</sup> *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; *Chicago, M. & St. P. R. R. v. Tomkins*, 167 U. S. 176.

<sup>2</sup> 134 U. S. 418, 460.    <sup>3</sup> 156 U. S. 649, 666.    <sup>4</sup> 169 U. S. 466, at pp. 517, 518.

tion. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all, and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained."

In every case in which a state rate has been declared void, the state has been represented either as itself petitioner, or, where the proceedings have been brought in behalf of the company, through the joinder as parties respondent of the commissioners, attorney-general, or other state officers specially charged with the making or enforcement of the rate.

## 2. CASES IN THE LOWER FEDERAL COURTS.

The decisions of the lower federal courts are to the same effect.

*Chicago & N. W. R. R. v. Dey*<sup>1</sup> was a bill in equity brought by a railroad company against state railroad commissioners to restrain them from enforcing, by suits for penalties or otherwise, their schedule of maximum freight rates. In granting the motion for a temporary injunction, Brewer, J., said:—

"Equity interferes to prevent a multiplicity of suits; and, where one act may be the foundation of many suits, the courts have a right, and it is their duty in the first instance, to stay that act as unlawful."

In *Interstate Com. Com. v. Cincin., etc., R. R.*,<sup>2</sup> which was a bill by the commission to enforce their order, Sage, J., in denying a motion for a preliminary restraining order against the company, says:—

"If the defendants are restrained from charging or collecting freight in excess of the rates fixed by the commission, they will be practically without remedy if at last the order of the commission should be held to be unlawful."<sup>3</sup>

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<sup>1</sup> 35 Fed. Rep. 866, 882. This case, decided in 1888, was, as already noted, the first in which a federal court set aside a state rate as unreasonably low; but the same principle of equity jurisdiction had been previously applied to a state rate passed in violation of the interstate commerce clause in *Louisville & N. R. R. v. Com'rs*, 19 Fed. Rep. 679.

<sup>2</sup> 64 Fed. Rep. 981.

<sup>3</sup> See also *Shinkle v. R. R.*, 62 Fed. Rep. 690, an Interstate Commerce Commission case to the same effect.

Cleveland G. L. & Coke Co. *v.* Cleveland<sup>1</sup> was a bill in equity to enjoin the enforcement of an ordinance fixing the price of gas in violation of the Fourteenth Amendment. A demurrer on the ground, *inter alia*, of lack of jurisdiction in equity, was overruled, Jackson, J., saying that the court "entertains no doubt about its jurisdiction to award the relief asked."

Capital City Gas Light Co. *v.* Des Moines<sup>2</sup> was a bill to have declared void a city ordinance fixing the price of gas, and to enjoin the enforcement thereof. A demurrer on the ground, *inter alia*, of lack of jurisdiction in equity was overruled, Woolson, J., treating the question of jurisdiction in equity as no longer open, and quoting the remarks of Miller, J., in the Minnesota case cited *supra*.

New Memphis Gas, etc., Co. *v.* Memphis<sup>3</sup> was a bill to enjoin the enforcement of an ordinance fixing the price of gas. A motion for a restraining order was granted, Clark, J., saying that the public could be protected by a bond against the event that the bill should finally be dismissed,

"while to refuse the injunction would possibly result in a destruction of the plaintiff's business and property before this litigation can be terminated."

In this connection it may be said that the suggestion which has been made of incorporating in the rate statute a provision that the schedule established should be kept in force until the termination of any litigation brought to test its constitutionality is unsound. The public can hardly be compelled to give security, and without security the company would suffer irreparable damage and practically be deprived of its property without due process of law if the schedule should turn out to be in violation of the Fourteenth Amendment.

In *Southern Pacific R. R. v. Com.*,<sup>4</sup> Judge McKenna continued a temporary restraining order pending the final decision of the court on a bill to enjoin the enforcement of a state freight rate.

*Indianapolis Gas Co. v. Indianapolis*<sup>5</sup> was a bill to enjoin the enforcement of a city ordinance fixing the price of gas. A motion for a restraining order was allowed, Baker, J., saying : —

"It is evident if the restraining order is refused and the ordinance should eventually be held invalid, the injury resulting to the complainant would be practically irremediable because of the number of its patrons and the small amount to be received from each. On the other hand,

<sup>1</sup> 71 Fed. Rep. 610, 615.

<sup>4</sup> 78 Fed. Rep. 236.

<sup>2</sup> 72 Fed. Rep. 818; s. c., *Ib.* 829.

<sup>5</sup> 82 Fed. Rep. 245, 246.

<sup>3</sup> 72 Fed. Rep. 952.

the rights of the city can be fully protected by requiring the complainant to give a bond."

*Cotting v. Kansas City Stock Yards Co.*<sup>1</sup> was a bill to enjoin the enforcement of a statute of Kansas fixing charges for the various services of stock yards. At the final hearing on the merits before Thayer, Circuit Judge, and Foster, District Judge, the jurisdiction in equity was sustained, but the bill was dismissed on its merits, the injunction, however, to continue ten days, and thereafter if an appeal should be taken.

*San Diego Land, etc., Co. v. Jasper*<sup>2</sup> was a bill to enjoin the enforcement of water rates fixed by a board of county supervisors. A demurrer on the ground, *inter alia*, of lack of jurisdiction was overruled. Ross, J., referring to the allegations of the bill, which set out the danger of irreparable damage and a multiplicity of suits, and the lack of any adequate remedy at law, says:—

"These averments are admitted by the demurrer. They may not be true in fact, but for present purposes are to be accepted as true. So taking them, it cannot be doubted, I think, that the bill makes a good case."<sup>3</sup>

### 3. CASES IN THE STATE COURTS.

As practically all litigation of this character is now carried on in the United States courts,<sup>4</sup> there are few decisions of the state courts upon the question here under discussion. Wherever the question has been raised, however, it has been settled in the state,

<sup>1</sup> 82 Fed. Rep. 850.

<sup>2</sup> 89 Fed. Rep. 274, 281.

<sup>3</sup> See also to the same effect: *Wilmington & W. R. Co. v. Com.*, 90 Fed. Rep. 33; *San Joaquin Irr. Co. v. Stanislaus County*, 90 Fed. Rep. 516; *Northern Pacific R. R. v. Keyes*, 91 Fed. Rep. 47; *Cleveland City Ry. Co. v. Cleveland*, 94 Fed. Rep. 385; *Western Union Telegraph Co. v. Myatt*, 98 Fed. Rep. 335; *Los Angeles Water Co. v. Los Angeles*, 103 Fed. Rep. 711, 739.

<sup>4</sup> It is, of course, perfectly clear that the circuit courts of the United States, as federal courts, under the act of Congress of March 3, 1875, as amended by the act of March 3, 1887, and of Aug. 13, 1888, have original jurisdiction of suits in equity of this nature, concurrent with the state courts, "where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2000," because these are strictly "suits . . . arising under the Constitution . . . of the United States." Diversity of citizenship is not necessary to give jurisdiction to the circuit court in such cases. In the language of Mr. Chief Justice Waite, in 96 U. S. 199, 203, the controversy is one "as to the operation and effect of the Constitution . . . upon the facts involved." See also 169 U. S. 466, 516; 134 U. S. 418, 459; 156 U. S. 649, 657; 172 U. S. 1; 104 Fed. Rep. 258; 103 Fed. Rep. 23, 216. And the test of the existence of the jurisdictional amount is in such cases the value of the right to be protected and the pecuniary amount of the injury to be prevented. 165 U. S. 107, 114, 115; 82 Fed. Rep. 65; 54 Fed. Rep. 547; 56 Fed. Rep. 352.

as well as in the federal courts, that the proper if not the only remedy for a corporation, claiming to be deprived of its property without due process of law through the operation of a state rate, is a bill in equity or some equivalent process praying for an injunction against the enforcement of the rate.<sup>1</sup>

There is, we believe, no judicial dissent from this proposition.

#### IV.

Under what circumstances must a suit in equity of the kind under consideration, in a circuit court of the United States, be deemed a suit against the state under authority of which the rates objected to were imposed, within the meaning of the Eleventh Amendment to the United States Constitution, which declares that "the judicial powers of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state."

It is, of course, true that, in determining the question whether a suit is against a state within the meaning of this Amendment, reliance can no longer be placed upon the simple test laid down in *Osborn v. Bank*<sup>2</sup> and *Davis v. Gray*,<sup>3</sup> namely, whether the state is by name or appropriate designation made a party defendant on the face of the record.<sup>4</sup> It is likewise true that no reliance can be placed upon the point that the Eleventh Amendment does not in terms forbid suits against a state by citizens of the same state, but only suits by citizens of other states.<sup>5</sup>

It is, however, important to emphasize the point that the conflict of authority upon the question to what extent the state must have a proprietary or corporate (as distinguished from a purely governmental) interest in the suit in order to render the state a necessary party according to the principles of equity jurisdiction — and

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<sup>1</sup> *Spring Valley W. W. v. San Francisco*, 82 Cal. 286; *San Diego Water Co. v. San Diego*, 118 Cal. 556.

<sup>2</sup> 9 Wheat. 738.

<sup>3</sup> 16 Wall. 203.

<sup>4</sup> But, as stated by Lamar, J., speaking for the Court in *Pennoyer v. McConaughy*, 140 U. S. 1, 12, the general doctrine laid down in the two cases of *Osborn v. Bank* and *Davis v. Gray*, affirming the jurisdiction of the circuit courts of the United States to restrain state officers from executing unconstitutional statutes of the state in a case falling within some recognized head of equity jurisdiction, has never been departed from, and is still fully recognized by the Supreme Court.

<sup>5</sup> *Hans v. Louisiana*, 134 U. S. 1.

therefore to make it impossible under the principles of equity jurisdiction for the circuit courts to entertain the suit if the state is not made a party, and equally impossible, under the Eleventh Amendment, to entertain the suit if the state is made a party — has really nothing to do with the question now under consideration; for it seems to have been settled that the interest of the state in the enforcement of a schedule of rates imposed by its authority must be regarded as governmental and not as proprietary or corporate.

It is unnecessary to do more than to refer to the authorities in which this conflict, or apparent conflict, of judicial opinion, is presented. The cases may be classified as follows: —

A. Cases involving a corporate or proprietary interest on the part of the state.

(a) The jurisdiction of the federal courts has been *denied*: —

(1) Where the relief sought was some particular disposition of some acknowledged property of the state, as in *Cunningham v. Macon, etc., R. R. Co.*<sup>1</sup> and *Christian v. Atlantic, etc., R. R. Co.*<sup>2</sup>

(2) Where the relief sought was the affirmative and specific performance of some contract of the state, as in *Louisiana v. Jumel*,<sup>3</sup> *Hapgood v. Southern*,<sup>4</sup> *North Carolina v. Temple*,<sup>5</sup> and *New York Guaranty Co. v. Steele*.<sup>6</sup>

(3) Where the relief sought was the enjoining of acts by individual officers of the state, which, if performed, would amount to a breach of some contract of the state, but would not otherwise constitute personal wrong-doing upon the part of the individual defendants, — at least of such a kind as to give equity jurisdiction over such individual defendants alone, as in *In re Ayres*.<sup>7</sup>

(b) The jurisdiction of the federal courts has been *sustained*: —

(1) Where the complainant seeks to enjoin by bill in equity the violation, or to compel by mandamus the performance of a merely ministerial duty, as in *Board of Liquidation v. McComb*,<sup>8</sup> *Sands v. Edmunds*,<sup>9</sup> *Rolston v. Missouri Fund Commissioners*.<sup>10</sup>

(2) Where the acts threatened were not a violation of ministerial duties, but were injurious by way of placing a cloud on the title to land, as in *Davis v. Gray*,<sup>11</sup> *Pennoyer v. McConnaughy*.<sup>12</sup>

It will be noted that in none of the foregoing cases where the jurisdiction has been sustained were the acts enjoined trespasses, torts, or other physical invasions of the complainant's property.

<sup>1</sup> 109 U. S. 446.

<sup>2</sup> 133 U. S. 233.

<sup>3</sup> 107 U. S. 711.

<sup>4</sup> 117 U. S. 52.

<sup>5</sup> 134 U. S. 22.

<sup>6</sup> *Ib.* 230.

<sup>7</sup> 123 U. S. 443.

<sup>8</sup> 92 U. S. 531.

<sup>9</sup> 116 U. S. 585.

<sup>10</sup> 120 U. S. 390.

<sup>11</sup> 16 Wall. 203.

<sup>12</sup> 140 U. S. 1.

B. Cases involving no corporate or proprietary interest on the part of the state.

Suits in which the state has no proprietary interest, brought against state officers threatening to violate, under a state law or administrative order of which they were charged with the enforcement, rights secured to the complainant by the Constitution or laws of the United States, have never been held to be suits against the state within the meaning of the Eleventh Amendment.

The cases may be divided into two classes : —

(a) Where the acts sought to be enjoined would, if performed, amount to physical invasions of the plaintiff's property ; that is to say, to common law trespasses or other torts of such a character as to call on settled principles of equity jurisdiction for the interposition of a court of equity, as, for instance, to prevent irreparable damage,<sup>1</sup> and the same principle applies in actions at law.<sup>2</sup>

*Osborn v. Bank* was a bill in equity against a state board, the state treasurer, and a tax collector to enjoin them from seizing in payment of taxes, in obedience to a mandatory statute of the state of Ohio, certain property of the complainant, and requiring them to restore to the complainant certain property already seized for the same purpose, but not yet turned over by them to the state. The equity of the bill was stated to be the danger of irreparable damage and the absence of any adequate remedy at law. A federal question was raised by the complainant's contention that the state statute in obedience to which the respondents were acting was in conflict with the federal statute incorporating the United States Bank, and with Art. I. sect. 8 of the Constitution of the United States, in pursuance of which said federal statute had been enacted. The respondents objected that the suit was against the state of Ohio within the meaning of the Eleventh Amendment. Marshall, C. J., speaking for the court and considering this contention of the respondents, said : <sup>3</sup> —

"It being admitted, then, that the agent is not protected by his connection with his principal, that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the court

<sup>1</sup> *Osborn v. Bank of United States*, 9 Wheat. 738; *Tomlinson v. Branch*, 15 Wall. 460; *Allen v. Baltimore & Ohio R. R. Co.*, 114 U. S. 311; *Shelton v. Platt*, 139 U. S. 591; *Stanley v. Schwalby*, 147 U. S. 508; *In re Tyler*, 149 U. S. 164; *Belknap v. Schild*, 161 U. S. 10.

<sup>2</sup> *United States v. Lee*, 106 U. S. 196; *Poindexter v. Greenhow*, 114 U. S. 270; *Scott v. Donald*, 165 U. S. 58; *Tindall v. Wesley*, 167 U. S. 204.

<sup>3</sup> At p. 842.



also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for doing?"

In *Allen v. Baltimore and Ohio R. R. Co.*, Mr. Justice Matthews, speaking for the court, said :<sup>1</sup>—

"The circumstances of this case bring it, so far as that remedy is in question [by injunction], fully within the principle established by this court by the decision of *Osborn v. U. S. Bank*, 9 Wheat. 739, and within the terms of the rule as declared in *Cummings v. National Bank*, 101 U. S. 503."

In *In re Ayers*, Mr. Justice Matthews, speaking for the court, says :<sup>2</sup>—

"In pursuance of the principles adjudged in the case of *Osborn v. Bank*, it has been repeatedly and uniformly held by this court that an injunction will lie to restrain the collection of taxes sought to be collected by seizures of property for taxes imposed in the name of the state, but contrary to the Constitution of the United States, the defendants being officers of the state threatening the distraint complained of. . . . The vital principle in all such cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant for which they are personally and individually liable."

(b) The second class of cases involving no proprietary interest on the part of the state in which the jurisdiction of the federal courts has been assumed or upheld, so far as the Eleventh Amendment goes, consists of cases, like those now under consideration, where the acts sought to be enjoined are simply the institution of litigation by state officers in the state courts.<sup>3</sup>

All of the cases referred to in the footnote were rate cases. All of them were bills in equity. In all of them the respondents were officers of states threatening to enforce solely by litigation in the state courts either state statutes or orders of state boards made

<sup>1</sup> At p. 314.

<sup>2</sup> 123 U. S. 443, at p. 500.

<sup>3</sup> *Chicago, B. & Q. R. R. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & N. W. R. R.*, 94 U. S. 164; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Stone v. Illinois Central R. R. Co.*, 116 U. S. 347; *Stone v. New Orleans, etc., R. R.*, 116 U. S. 352; *Georgia R. R. & Banking Co. v. Smith*, 128 U. S. 174; *San Diego v. National City*, 174 U. S. 739; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413; *Reagan v. Mercantile Trust Co.*, 154 U. S. 419; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 420; *Smyth v. Ames*, 169 U. S. 466, and 171 U. S. 361; *Chicago, M. & St. P. R. R. v. Tomkins*, 176 U. S. 167. See also *Smith v. Reeves*, 178 U. S. 436; 110 Fed. Rep. 3. *Contra*, *State v. Chicago, R. I. & P. R. Co.*, 87 N. W. Rep. 188 [Sup. Ct. Neb.]; and s. c. 85 N. W. Rep. 556.

under legislative authority fixing maximum rates for the service of common carriers or other public service corporations. In some of them the federal question presented was twofold; namely, that the statutes or orders in question violated the contract clause of the United States Constitution in respect of the complainant's charter, and also violated the Fourteenth Amendment to the United States Constitution; but in all of them the principal ground of jurisdiction relied on by the complainant, and in most of them the sole ground, was that the statute or order invaded rights secured to him by that provision of the Fourteenth Amendment to the United States Constitution which forbids a state to deprive any person of property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws. In these cases the equity of the bill is stated to be the prevention either of a multiplicity of actions or of other irreparable damage for which the law afforded no adequate remedy, or both.

In the first seven of these cases, while the relief sought was after elaborate consideration denied either upon the merits or for other reasons, the court appears to take for granted<sup>1</sup> that they could not be disposed of as suits against the sovereign, which, as stated by Mr. Justice Miller in discussing the Eleventh Amendment, in *United States v. Lee*,<sup>2</sup> is the ground on which the Supreme Court will of its own motion dismiss any case open to that objection.

The next five cases (*Reagan v. Farmers' Loan and Trust Co.* and *Smyth v. Ames*) contain an elaborate exposition of the reasons why such suits are not obnoxious to the provisions of the Eleventh Amendment, and the relief prayed for was granted in both cases.

In the last case (*Chicago, M. & St. P. R. R. v. Tomkins*) the relief prayed for in the bill was granted without discussion of this point. The silence of the court on the question of federal jurisdiction — always equivalent to an affirmation that such jurisdiction exists<sup>3</sup> — is of special significance in the *Tomkins* case, as

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<sup>1</sup> See the remarks of Mr. Justice Brewer on this point in *Chicago & N. W. R. R. v. Dey*, 35 Fed. Rep. 866, at 871, 872.

<sup>2</sup> 106 U. S. 196, 215, 216.

<sup>3</sup> As indicated by the rule that the court must of its own motion dismiss a bill for lack of federal jurisdiction, even though the existence of such jurisdiction is assented to by both parties. See *Metcalf v. Watertown*, 128 U. S. 586, 587, where Harlan, J., says that "whether the court had or had not jurisdiction (by reason of a federal question) is a question which we must examine and determine, even if the parties forbear to make it or consent that the case be considered on its merits." See also *Desty*, Fed. Proc., sect. 84, 9th ed., p. 340, and cases cited.

that decision was subsequent to the discussion of the question in the Reagan and Nebraska cases and in *Fitz v. McGhee*, referred to below.

In *Reagan v. Farmers' Loan and Trust Co.*, where the attorney-general and state railroad commissioners were enjoined from enforcing by litigation in the state courts a rate fixed by the commission, Mr. Justice Brewer, speaking for the court, and considering the objection that the suit was against the state of Texas, said :<sup>1</sup>—

“We are unable to yield our assent to this argument. So far from the state being the only real party in interest and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers; and the only direct and pecuniary interest which the state can have arises when it abandons its governmental character, and as an individual employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the state is interested in the question, but only in a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes; and yet a frequent and unquestioned exercise of jurisdiction of courts, state and federal, is in restraining the collection of taxes illegal in whole or in part. Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make its administration an illegal burden and exaction upon the individual.”

In *Smyth v. Ames* the attorney-general and state commissioners were enjoined from bringing suits in the state courts to enforce a rate fixed by the legislature. Mr. Justice Harlan, speaking for the court, and considering the objection that the suit was against the state of Nebraska, said :<sup>2</sup>—

“But, to prevent misapprehension, we add that within the meaning of the Eleventh Amendment of the Constitution the suits are not against the state, but against certain individuals charged with the administration of a state enactment which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiff. It is the settled

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<sup>1</sup> At p. 390.

<sup>2</sup> At p. 518.

doctrine of this court that a suit against individuals for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the state within the meaning of that amendment."

Chicago, M. & St. P. R. R. *v.* Tomkins<sup>1</sup> follows, as already noted, the decision in the Reagan and Nebraska cases; and the members of a state commission were enjoined from instituting proceedings in the state courts to enforce the order.

(c) The case of *Fitz v. McGhee*.

In the mean time, however, came *Fitz v. McGhee*,<sup>2</sup> which is now often relied upon by state officials as authority for the proposition that suits of this character against them are in reality against their state.

That was a bill in equity in the circuit court by the receivers of a railroad owning a toll bridge against, *inter alios*, the governor, attorney-general, and the county solicitor of the state of Alabama, to enjoin them from instituting criminal prosecutions and civil proceedings in the nature of mandamus or *quo warranto* against the complainants for violation of a statute of Alabama fixing the maximum rate of toll to be charged by the complainants for foot passengers and others using the bridge, and imposing a fine for every violation of this law. The bill alleged that a large number of indictments had been found against the toll-keepers of the bridge by a grand jury of the state, and prayed for an injunction against the further prosecution of said indictments. An examination of the statutes of Alabama shows that there was nothing in the act referring to the governor, the attorney-general, any county attorney, commissioner, or other officer of the state of Alabama, or defining or declaring the persons responsible for the enforcement of the law; and there was nothing in any other law of the state of Alabama, or in the constitution thereof, imposing upon any officer of the state any special duty or discretion with reference to the enforcement of said act, except in so far as the governor and attorney-general were by the very nature of their offices and their official oaths charged generally with the enforcement of all the laws of the state.

The Supreme Court held that this was a suit against the state of Alabama, Mr. Justice Harlan, speaking for the court, saying:<sup>3</sup> —

"It is to be observed that neither the attorney-general of Alabama

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<sup>1</sup> 176 U. S. 167.

<sup>2</sup> 172 U. S. 516.

<sup>3</sup> At p. 529.

nor the solicitor of the eleventh judicial circuit of the state appears to have been charged by law with any special duty in connection with the Act of Feb. 9, 1895. In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases, among which were *Poindexter v. Greenhow*, 114 U. S. 270; *Allen v. B. & O. R. R.*, 114 U. S. 311; *Pennoyer v. McConnaughy*, 140 U. S. 1; *In re Tyler*, 149 U. S. 164; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 388; *Scott v. Donald*, 165 U. S. 58; and *Smyth v. Ames*, 169 U. S. 466."

"Upon examination it will be found that the defendants in each of those cases were officers of the state specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which it was averred that they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If because they were law officers of the state a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney-general based upon the theory that the former as the executive of the state was in a general sense charged with the execution of all its laws, and the latter as attorney-general might represent the state in litigation involving the enforcement of its statutes."<sup>1</sup>

It will be seen that the court appears to distinguish the Reagan and Nebraska cases — the only rate cases cited — on the ground

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<sup>1</sup> The last sentence in the quotation from the opinion in *Fitz v. McGhee* seems to have been written in disregard of the fact that an injunction against the enforcement of a state law cannot issue from a federal court unless the bill shows a case within the *equity* jurisdiction of the court. The complainant must set out sufficient reasons for invoking the chancery powers of the court, or his bill will fail, whether brought in a state or federal court. This consideration would dispose of any such wholesale invocation of federal aid as is suggested in the sentence quoted, and, in fact, of most attempts to get into the federal courts without diversity of citizenship. Cases of alleged violations of the contract clause, for instance, seldom present the elements of equity jurisdiction. Rate cases are peculiar in this respect, owing to the multiplicity of suits and the irreparable damage threatened. Compare *Shelton v. Platt*, 139 U. S. 591

that in the case under consideration the respondents were not specifically charged by the state laws with the enforcement of the statute complained of ; and to distinguish the other cases cited on the ground that in them it was alleged that the respondents were about to commit, under color of the state law, some specific wrong or trespass to the injury of the plaintiff.

This line of reasoning may not be wholly satisfactory as a means of reconciling the various decisions on the Eleventh Amendment ; but it certainly could not have been the purpose of the court to intimate that every suit to enjoin state officers from the institution of civil proceedings under a state law where no tort or trespass was threatened was a suit against a state, for such a decision would have overruled *Reagan v. Farmers' Loan and Trust Co.*, and *Smyth v. Ames*, and would itself have been overruled by *Chicago, M. & St. Paul R. R. v. Tomkins*.

In order to appreciate the nature of the distinction asserted by the court, in *Fitz v. McGhee*, to exist between that case and the *Reagan* cases and *Smyth v. Ames*, it will be well to examine the statutes brought in question in the two last-named cases as well as the statutes considered in *Chicago, M. & St. Paul R. R. v. Tomkins*.

Taking up the *Reagan* case first we find, by reference to the Supplement to Sayles' Texas Statutes of 1888-93,<sup>1</sup> that the law of April 3, 1891, provided, in sect. 19, that suits for the penalties imposed by the act should be brought in the name of the State of Texas by the attorney-general, and that by sect. 21 it was made the duty of the railroad commission to "see that the provisions of this act and all laws of this state concerning railroads are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the state therefor recovered and collected ; and said commission shall report all such violations with the facts in their possession to the attorney-general, or other officers charged with the enforcement of the laws, and request him to institute the proper proceedings." The provision in reference to suits for penalties was mandatory, but the provision in regard to the general enforcement of the act — as, for instance, by mandamus, *quo warranto*, and other similar remedies — appears to have been discretionary. Nevertheless, the injunction issued in that case against the attorney-general restrained him from instituting any kind of litigation, not only suits for penalties, but also any other form of action or legal proceeding.

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<sup>1</sup> P. 773 *et seq.*

In *Smyth v. Ames*, sect. 16 of the Nebraska statute of April 12, 1893,<sup>1</sup> provided that, whenever any common carrier should violate or refuse to obey the act or any lawful order of the board, "it shall be the duty of the board . . . to plead in a summary way by petition filed in the judicial court of the district ;" . . . and sect. 19 provided that, "if such railroad shall refuse or neglect to comply with such order, the board shall order the attorney-general of the proper county to institute a suit to compel such railroad company to comply with such order, and it shall be the duty of the attorney-general or the county attorney of the proper county at the request of the board . . . to apply to the supreme court . . . for a writ of mandamus to compel such railroad to comply with said order." These provisions are stronger than the provisions in the *Reagan* case, since they are all mandatory in form, and define the kind of legal proceeding which shall be instituted.

In *Chicago, M. & St. P. R. R. v. Tomkins* the material provisions of the South Dakota statute of February 3, 1897,<sup>2</sup> are : Sect. 10 provides for the issuing of a writ of mandamus by a state court to compel a railroad to post schedules "at the relation or upon the petition of the state board of railroad commissioners of this state ;" sect. 15 authorizes, but does not require the commissioners to apply to certain state courts for a subpoena requiring the production of the books and papers of any railroad ; sect. 19 makes it the duty of the commissioners to apply to certain state courts for an injunction to compel obedience to any lawful order of the board, and also provides that, whenever such petition shall be filed or presented or be prosecuted by the state commissioners, "they may require the attorney-general of the state to prosecute the same, and in such prosecution he shall have the right to have the assistance of the state's attorney of any county in which any such proceedings are instituted, and it is hereby made the duty of any state's attorney to render such assistance ; or the state commissioners may employ any other attorney . . . to prosecute the same ;" sect. 32 requires the commissioners to institute suits against any railroads whom they believe to be guilty of "extortion" for the penalties prescribed by the act ; sect. 41 provides that the "attorney-general of the state of South Dakota shall at all times, when requested, give the railroad commissioners such counsel and advice as they may from time to time

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<sup>1</sup> Ch. 72, art. 12.

<sup>2</sup> Laws of 1897, ch. 110.



require, and it is hereby made his duty to institute and prosecute, whenever requested by the railroad commissioners, all suits which said railroad commissioners may deem it expedient and proper to institute." Sect. 43 is mandatory upon the attorney-general to institute proceedings for the forfeiture of the franchise of any company guilty of continued violations of the act. It will be seen that the provisions of the statute in this case were partly mandatory and partly merely permissive; but the reason for the omission of the attorney-general as a party respondent was apparently that the bill, being filed the next day after the publication of the schedules of rates complained of, did not (and doubtless could not) allege that the attorney-general was threatening to enforce the schedule by proceedings in the state courts.

In these three cases, one of which was subsequent to *Fitz v. McGhee*, an injunction was granted against the commissioners to prevent their enforcing the order by any kind of proceeding in the state courts; and in two of them the attorney-general was also enjoined from taking any steps to enforce the order.

From this examination of the statutes in question in the *Reagan*, *Smyth*, and *Tomkins* cases it seems clear that it is not the fact that one remedy rather than another is prescribed by the statute, or that the statute makes the adoption of some remedies mandatory, and by implication leaves others to the discretion of whatever officer may seek to enforce the statute, but rather the specific designation of particular officers as the individuals to enforce the statute and the command to them to enforce it that constitutes "special charging" in the sense of *Fitz v. McGhee*, and prevents a suit in equity to restrain such officers from enforcing the statute from being a suit against the state which has specially charged them to enforce it.

Whether the reason for this distinction is sound may with submission be doubted.

Mr. Justice Brewer in his vigorous discussion of the effect of the Eleventh Amendment in the *Reagan* cases says nothing which can be construed as an allusion to these aspects of the Texas statutes which were before him, — a singular omission if the court in those cases thought that the question of federal jurisdiction depended upon the element of "special charging."

Again in *Smyth v. Ames*, Mr. Justice Harlan himself, speaking for the court and discussing the question as to the effect of the Eleventh Amendment, uses language which seems hardly to suggest either the importance or even the existence of the test of



“special charging.” Moreover, the final decree in that case<sup>1</sup> is in the most sweeping terms, and in *Smith v. Reeves*,<sup>2</sup> a decision subsequent to *Fitz v. McGhee*, Mr. Justice Harlan, delivering the opinion of the court and discussing the objection (which was upheld) that the suit was against a state, makes no mention of the doctrine of special charging or of *Fitz v. McGhee*, but reaffirms the doctrine of the *Reagan* cases and of *Smyth v. Ames*.

Finally, in the *Tomkins* case, which is the most recent rate case, no reference is made to the matter of “special charging.”

It is difficult to understand why in determining the effect of the Eleventh Amendment in suits of this nature it can be material that some or all of the respondents are acting in pursuance of a special rather than a general command of the state, or that the particular form of procedure adopted by them to enforce it is prescribed by the statute itself or selected by them in the exercise of discretion from the appropriate remedies furnished by the general statutes or common law of the state.

Equity jurisdiction is given by the allegations of the bill in reference to the nature of the injury about to be inflicted; federal jurisdiction is given by the allegation that the justification for the threatened acts depends upon the application and construction of the Fourteenth Amendment, with which the bill alleges the state statute or order and the threatened acts of the officials thereunder are in conflict. If the last-mentioned allegation turns out to be untrue, then the federal court, retaining jurisdiction because the bill presents a federal question, nevertheless decides that question in favor of the respondents; that is to say, decides that the law or order which they are seeking to enforce is valid so far as the Fourteenth Amendment is concerned. In that case if the respondents are acting under some general provision of statute or common law, making it their duty to enforce all the laws of the state, then that general mandate includes the valid law in question, and a special statutory mandate, if there were one, would be mere surplusage. But if, on the other hand, the federal court, having taken jurisdiction by reason of the federal question, finds

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<sup>1</sup> Printed in full in 171 U. S., pp. 362-364.

<sup>2</sup> 178 U. S. 436. In connection with *Smith v. Reeves* (which was not a rate case) see the similar case of *President of Yale College v. Sanger*, 62 Fed. Rep. 177, where jurisdiction of a suit in equity against the treasurer of Connecticut was taken, and negative relief given by enjoining him from paying the income of a certain fund held by him in his official capacity to any person except the complainant. The Eleventh Amendment is discussed in this case. See also *Minneapolis Brewing Co. v. McGilivray*, 104 Fed. Rep. 258.

that that question must be decided adversely to the respondents, then the provisions, if any, of the statute in question specially charging the respondents with the duty of enforcing its substantive requirements in reality specially charge them to deprive the complainant of its property without due process of law, and are, therefore, as much void as the substantive part of the statute. In such a case to say that unless there are such special statutory provisions the suit is against the state within the meaning of the Eleventh Amendment, is to say in effect that jurisdiction under one portion of the Constitution depends upon the existence of certain statutory provisions which are wholly void under another portion of the Constitution. In other words, if jurisdiction is taken by reason of the presence of such special statutory provisions, then the exercise of the jurisdiction may show that those provisions are wholly void. The statement of the court in *Fitz v. McGhee* that unless the respondents are specially charged with the enforcement of the statute, then if jurisdiction were sustained it would follow that "the constitutionality of every act passed by the legislature could be tested by a suit against the governor and attorney-general based upon the theory that the former as the executive of the state was in a general sense charged with the execution of all its laws, and the latter as attorney-general might represent the state in litigation involving the enforcement of its statutes," seems, as has been already pointed out, to blur the distinction between the two senses in which the term jurisdiction is used in this class of cases, *i. e.*, equity jurisdiction and federal jurisdiction. In the case supposed by the court, *ex hypothesi*, the elements of *equity* jurisdiction would be lacking, and for that reason the suit could not be maintained. Moreover, there seems to have been no reason for making the governor of Alabama a party respondent in *Fitz v. McGhee*; and the bill, it would seem, might have been dismissed as to him and retained against those respondents, if any, who were proved to be threatening to inflict injuries upon the complainant such as a court of equity has jurisdiction to enjoin. It is generally no part of the duty of the governors of American states to act as attorneys for their states in judicial proceedings, and it does not appear that the governor in *Fitz v. McGhee* had done so or was threatening to do so.

Again from the standpoint of policy such a test as that of special charging seems open to objection. The common law offers ample remedies for compelling corporations to obey such statutory requirements as those with which we are dealing, and for punish-

ing them for disobedience. The duties and powers naturally incident to the office of attorney-general of any state are quite sufficient to confer upon the incumbent authority to employ any or all of those remedies on behalf of the state. In reality, therefore, no special charging is at all necessary to accomplish the enforcement of such laws. If it is found that without such special provisions suits in equity in the federal courts will be held to be suits against the state, there will be no reason for retaining such provisions and every reason for omitting them from future rate statutes; and thus no jurisdiction will be left to the federal courts in such cases except the jurisdiction of the supreme court on writ of error to the highest court of the state. This surely is not a desirable result.

If the foregoing criticism of the rule laid down in *Fitz v. McGhee* is deemed sound, it may be added that there is perhaps a way of distinguishing that case on the facts from the Reagan cases, *Smyth v. Ames*, and the Tomkins case. For in *Fitz v. McGhee* the proceedings against which the injunction appears principally to have been sought were criminal proceedings, with which on other grounds courts of equity have generally no jurisdiction to meddle.<sup>1</sup> This is the line of distinction hinted at in the recent case of *Haverhill Gas Light Co. v. Barker et al.*,<sup>2</sup> where Lowell, J., says: "Again, in *Fitz v. McGhee* the decree sought enjoined state officers from prosecuting indictments and criminal proceedings; no such proceedings are sought to be enjoined in this case."

#### V.

An important limitation upon suits of this character is imposed by section 720 of the Revised Statutes of the United States, which provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."<sup>3</sup>

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<sup>1</sup> In re Sawyer, 124 U. S. 200, 104 Fed. Rep. 258, 272.

<sup>2</sup> 109 Fed. Rep. 694. See also *Ball v. Rutland R. R. Co.*, 93 Fed. Rep. 513, which can be distinguished on the same ground, and also because the elements of equity jurisdiction seem to have been lacking. Compare *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335, where *Fitz v. McGhee* is discussed.

<sup>3</sup> The elaborate discussion of the effect of this section in the note at the end of the recent case of *Garner v. Second Nat. Bank*, 16 C. C. A. 86, 90, leaves little to be added.

Section 720 is merely declaratory of a rule of comity. It is settled that the section has no application to cases where the bill is filed in the federal court before any suits have been begun in the state courts by the respondents.<sup>1</sup> No question concerning the effect of section 720 was raised in the Reagan cases, *Smyth v. Ames*, or *Chicago, etc., R. R. Co. v. Tomkins*, although in the final decree of the circuit court in the principal Reagan case, affirmed by the Supreme Court, it was ordered, *inter alia*, that "all other individuals, persons, or corporations be and they are hereby perpetually enjoined, restrained, and prohibited from instituting or *prosecuting* any suit or suits against the said railroad company for the recovery of any damages, overcharges, penalty or penalties, under or by virtue of the said act or any of its provisions, or under and by virtue of the said tariffs, orders, or circulars of the said railroad commission of Texas, etc."<sup>2</sup> No shippers or persons threatening to bring private suits for damages, overcharges, or penalties were made parties respondent in that case, and it does not appear whether at the time the bill was filed any such private suits had actually been brought or were pending in any state court. It seems clear that although private persons threatening to bring suits under such a statute may be made respondents, they are not necessary parties. If any such persons have actually begun suits in a state court, then it would seem that they cannot be enjoined from prosecuting the same by a federal court, and should not be made parties to the bill. In such case it will be sufficient to make the state officers over whom the federal court has jurisdiction in equity parties respondent (assuming, of course, that they have not actually begun litigation in a state court to enforce the statute or order) and such private persons as it is desired to enjoin who are threatening to begin but have not actually begun litigation in state courts to enforce the statute for their own benefit. Practically it is generally sufficient to obtain a prompt adjudication of the unconstitutionality of the statute or order in a suit in equity against the state officers charged with its enforcement. Where, as in *Cotting et al. v. Kansas City Stock Yards Co., et al.*,<sup>3</sup> the plaintiffs are stockholders, the corporation

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<sup>1</sup> 165 U. S. 443; 169 U. S. 432; 4 C. C. A. 503; 109 Fed. Rep. 3; 59 Fed. Rep. 6, 385; Fed. Cas. No. 8541; *ib.* No. 4830; 44 Fed. Rep. 663; 7 *ib.* 45. For the application of this rule in removal cases, see 121 U. S. 634.

<sup>2</sup> 154 U. S. 370.

<sup>3</sup> 82 Fed. Rep. 850; s. c. 79 *ib.* 679; 82 *ib.* 839.

itself as well as its officers who have declined to protect its interests by instituting the litigation in its name are of course also made parties defendant.

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Since our entire article was put in type, a decision has been rendered by the Supreme Court of the United States (November 25, 1901) in *Cotting et al. v. Kansas City Stock Yards Co. et al.*,<sup>1</sup> with an opinion by Mr. Justice Brewer dealing with many of the questions to which we have referred. We can only indicate briefly the respects in which the views we have expressed are confirmed by or inconsistent with Mr. Justice Brewer's opinion.

These were two bills in equity filed in 1897 in the Circuit Court of the United States for the District of Kansas by two stockholders of a Kansas corporation, both citizens of Massachusetts, against said corporation and certain of its officers and the attorney-general of Kansas. The suits were brought in behalf of the plaintiffs and of all other stockholders having a like interest. The main purpose of the suits was to have declared invalid a certain act of the legislature of Kansas approved March 3, 1897, entitled "An Act defining what shall constitute public stock yards, defining the duties of the person or persons operating the same, and regulating all charges thereof, and removing restrictions in the trade of dead animals, and providing penalties for violations of this act." A temporary restraining order was granted and a motion for a preliminary injunction made, pending which the court appointed a special master to take testimony upon all matters bearing upon the preliminary injunction prayed for. After a hearing upon the master's report the motion for an injunction was refused and the restraining order set aside. It was thereupon stipulated that the defendants should forthwith file answers, that replications should be immediately filed, and that there should be a final hearing upon the pleadings, proofs, master's report, and exhibits without further testimony from either party. On October 28, 1897, after argument, the court dismissed the bills of complaint, and afterwards an appeal was taken to the Supreme Court of the United States. The circuit court, however, made an order continuing in force the restraining order upon the filing by the corporation of a bond for \$200,000 conditioned for the payment to all parties entitled thereto of all

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<sup>1</sup> 79 Fed. Rep. 679; 82 ib. 839, 850.

overcharges for yarding and feeding live stock, in case the Supreme Court should affirm the judgment of the circuit court.

The important findings of the master were that the value of the property used for stock yard purposes at the time to which the bill related was \$5,388,003.25 ; that the gross income realized by the company during the year 1896, which was taken as representing its average gross income, was \$1,012,271.22 ; that the total expenditures of the company for all purposes during the same period amounted to \$535,297.14, thus indicating a net income for the year of \$476,974.08. The circuit court increased the estimate of net income by adding to the expenditures the sum of \$113,584.65, for repairs and construction, thus making the net income \$590,558.73. It was found also as a fact that if the rates prescribed by the statute for yarding and feeding stock had been in force during the year 1896 the income of the stock yards company would have been reduced that year \$300,651.77, leaving a net income of \$289,916.96, which would have yielded a return of  $5\frac{8}{10}$  per cent. on the value of the property used for stock yard purposes, and of  $4\frac{6}{10}$  per cent. upon the amount of the capital stock.

Section 1 of the statute was as follows : " Any stock yards within this state, into which live stock is received for the purpose of exposing or having the same exposed for sale or feeding, and doing business for a compensation, and which for the preceding twelve months shall have had an average daily receipt of not less than one hundred head of cattle, or three hundred head of hogs, or three hundred head of sheep, are hereby declared to be public stock yards."

The other material provisions of the statute were, a requirement that itemized statements of business done be filed annually with the secretary of state by stock yard companies ; that " any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for the first offence not more than one hundred dollars ; for the second offence not less than one hundred dollars nor more than two hundred dollars ; and for the third offence not less than two hundred dollars nor more than five hundred dollars and by imprisonment in the county jail not exceeding six months for each offence ; and for each subsequent offence he or they shall be fined in any sum not less than one thousand dollars and by imprisonment in the county jail not less than six months."

Section 8 made it " the duty of the attorney-general to prosecute all violations of the provisions of this act."



We premise that not all of the positions suggested or expressly declared by Mr. Justice Brewer can be regarded as held by a majority of the court. For Justices Harlan, Gray, Brown, Shiras, White, and McKenna expressly put their

“assent to the judgment of reversal — so far as the merits of this case are concerned — upon the ground that the statute of Kansas in question is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applies only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws. Upon the question whether the statute is unconstitutional upon the further ground that, by its necessary operation, it will deprive that company of its property without due process of law, we deem it unnecessary to express an opinion.”

*First.* Taking up the point upon which all the judges agree, this case is undoubtedly the leading as it is the latest authority for the proposition laid down in the earlier part of this article, that arbitrary and capricious discrimination between companies engaged in the same kind of business is as much a denial of the equal protection of the laws in statutes regulating rates and prices as in statutes of the sort under consideration in *Yick Wo v. Hopkins*; <sup>1</sup> and that where it appears that there are several stock yards companies in a state, a statute which in terms applies only to those “which for the preceding twelve months shall have had an average daily receipt of not less than one hundred head of cattle, or three hundred head of hogs, or three hundred head of sheep,” establishes an arbitrary and unconstitutional discrimination against the single company to which as a matter of fact it applies.

*Second.* It is the view of Mr. Justice Brewer that *any* discrimination based upon the amount of business done is, irrespective of what might otherwise be the reasonableness of the rates or of other considerations, arbitrary and unconstitutional. But it is believed to be a fair inference from the opinion of Mr. Justice Harlan, with whom five justices concurred, that a majority of the court is not prepared to go so far as that. The majority appear rather to condemn a discrimination which, while in terms based solely upon the amount of business done, in reality is aimed at a particular company described in general terms. This view is certainly more strictly in harmony with the principles of *Yick Wo v. Hopkins*.

*Third.* Mr. Justice Brewer announces a distinction between

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<sup>1</sup> 118 U. S. 356.

companies engaged in a "strictly" or "distinctively public employment" and those "doing a work in which the public has an interest," and draws certain very important conclusions therefrom. In the first class he puts "common carriage, supply of water, gas," etc., and suggests a further definition of it by the following expressions: "Work of a confessedly public character;" "a public service;" "that which is a proper work for the state;" "cases in which a public service is distinctly intended and rendered;" where "the owner has intentionally devoted his property to the discharge of a public service;" "the work of the state;" where the party is specially privileged to exercise some of "the powers of the state," *e. g.* "eminent domain."

In the second class he mentions grain elevators and stock yards, and cites as illustrative authorities, *Munn v. Illinois*,<sup>1</sup> *Budd v. New York*,<sup>2</sup> *Brass v. Stoeser*,<sup>3</sup> and other cases, and for the purpose of further definition employs the expressions "cases . . . in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use," or "in such a position that willingly or unwillingly the public has acquired an interest in its use;" where, "in pursuit of merely private gain he has placed his property in such a position that the public has become interested in its use;" "property used solely for purposes of private gain, and which only by virtue of the conditions of its use become such as the public has an interest in;" property not used "in the discharge of a purely public service;" an "individual . . . not doing the work of the state," and who "acquires from the state none of its governmental powers."

We again suggest that it would be unsafe to infer from anything in the report that the foregoing language of Mr. Justice Brewer expresses the opinion of a majority of the court.

We stated in the earlier part of this article<sup>4</sup> that it is difficult if not impossible to express in general terms, at once clear and useful, the distinction between the undertakings which historically have been subject to statutory or common law regulation in respect of rates and prices, and those to which such regulation has more recently been extended. We did, however, attempt a partial classification in which the possession of some governmental powers like eminent domain, referred to by Mr. Justice Brewer, became material. As to whether Mr. Justice Brewer's endeavor to classify

<sup>1</sup> 94 U. S. 113.

<sup>2</sup> 143 U. S. 517.

<sup>3</sup> 153 U. S. 391.

<sup>4</sup> 15 HARVARD LAW REVIEW 253, 254.



with greater precision than has heretofore been attempted is superior to the method of "judicial inclusion and exclusion," we do not feel called upon to express an opinion.

But the conclusions drawn by Mr. Justice Brewer from the distinction between "strictly public employments" and those in which property has been devoted "to a use in which the public has an interest" are of far-reaching importance. After an elaborate review of the decisions of the Supreme Court, he says, referring to undertakings of the second class (not "strictly public"), "What shall be the test of reasonableness in those charges is absolutely undisclosed;" and the conclusion of his reasoning is that "the same rule as to the limit of judicial interference" does not apply in the two classes of cases; that while in the first class of cases "the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered," and also "the value of the services rendered to each individual;"<sup>1</sup> the principal question in the second class of cases is "whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction;" in other words, that in the second class of cases "the question is always not what does he make as the aggregate of his profits, but what is the value of the services which he renders to the one seeking and receiving such services;" and that in determining this value the customary charges of others for the same services furnish an important if not a controlling test. For this he relies principally upon *Canada Southern Railway Co. v. International Bridge Co.*<sup>2</sup> Consequently he holds that the finding of fact of the Circuit Court<sup>3</sup> that the charges made by the Kansas City Stock Yards Co. were no greater (and, in many instances, less) than those of any other stock yards in the country, should have been regarded as decisive in favor of the plaintiffs, and that its effect could not in any wise be modified by the result of the principal investigation, namely, that the statutory rates would permit the company to earn a net profit of "5.3 per cent. on the value of the property used for stock yard purposes, as fixed by the master." In other words, the circuit court "proceeded upon lines which . . . were too narrow," and mistook the comparative significance of its findings of fact.

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<sup>1</sup> Mr. Justice Brewer throws out the suggestion that it ought to be constitutional in this class of cases to fix rates so low as to leave practically no profit at all.

<sup>2</sup> 8 App. Cas. 723, 731.

<sup>3</sup> 82 Fed. Rep. 850.

It cannot safely be asserted that these conclusions of Mr. Justice Brewer represent the views of a majority of the court. The further point made by Mr. Justice Brewer, that if the statute is construed as contemplating a separate offence with a separate penalty for each excessive charge *per head*, as distinguished from the entire number of stock received in one shipment, the enormous aggregate of the penalties would amount to a practical intimidation of the company from asserting its constitutional rights and thus to a denial of the equal protection of the laws, is not stated by him as a ground of the decision, and may therefore be regarded merely as an interesting suggestion.

In reference to them we desire to make only these suggestions.

*First.* With the exception of certain remarks of Mr. Justice Bradley relating to wharfage charges in *Transportation Co. v. Parkersburg*,<sup>1</sup> referred to by Mr. Justice Brewer, in which, however, no question under the Fourteenth Amendment was before the court, the only references to the value of the services to the recipient in the opinions of the Supreme Court are such as to convey the impression that that consideration may justify in some cases a *lower* legislative rate than is sufficient to yield a fair return upon the *original investment or cost* of the plant.<sup>2</sup> So far, therefore, as the Fourteenth Amendment and the decisions of the Supreme Court thereunder are concerned, it is an entirely new step to hold that the real value of the services to the recipient may render unconstitutional, *i. e.*, unreasonably low, a legislative rate which, while permitting what would otherwise be considered a fair net profit on the actual present value of the property in the use of which the public has an interest, simply takes away the excess which the party has been able to obtain over and above such fair profit by virtue of his superiority to his competitors in point of organizing ability, amount of capital invested, volume of business, etc.

*Second.* It does not follow that because this step is novel it ought not to be taken. Apparently, without reversing or seriously modifying prior decisions, it cannot be taken with reference to railroads and water companies. Apparently it may be taken with reference to stock yard companies and other enterprises which cannot now be included within any precise general definition.

The order of the Supreme Court was "that the decree of the circuit court be reversed, and the case remanded to that court,

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<sup>1</sup> 107 U. S. 691, 699.

<sup>2</sup> See particularly the remarks of Mr. Justice Harlan in *San Diego Land Co. v. National City*, 174 U. S. 739, 757, quoted by Mr. Justice Brewer.

with instructions to enter a decree in favor of the plaintiffs and against the corporation and its officers, in accordance with the prayer of the bills, and also a decree dismissing the suit as to the attorney-general of Kansas, without prejudice to any further suit or action."

The form of the last part of this order and the reasons therefor as stated by the court are such that no new light is thrown upon the question of jurisdiction under the Eleventh Amendment.

*N. Matthews, Jr.*  
*W. G. Thompson.*

Boston, December 3, 1901.

## THE LAW OF CAPACITY IN INTERNATIONAL MARRIAGES.

ONE of the most intricate questions that can arise out of the conflict of laws is that of the validity of international marriage ; and the effect of invalidity is so disastrous, both materially and morally, that the right solution of the problem is one for which above all others the conscientious lawyer should anxiously seek. Not only is the problem intricate in its nature, but so various are the solutions reached in the different civilized states that no lawyer can safely advise in the matter without some familiarity with the law of each country involved in the marriage.

Marriage is now regarded in all civilized states as a status based upon legal consent of the parties ; this consent, however, is not self-operative, but gives rise to the status only as the result of the consent of the proper sovereign power, acting through its law. So far as the parties are concerned, assuming their consent in fact, nothing further is required for a valid marriage but their capacity to give a legal consent ; this capacity of parties is the greatest difficulty involved in determining the validity of an international marriage.

There is a fundamental difference between the common law and the civil law of Europe in their conception of personal capacity. The common law regards a man as a natural creature ; if he is alive, if he has a mind and exercises it, if he is a free and independent being, the law accepts him as such. A few cases are, to be sure, dealt with artificially : an infant, though he may in fact have a consenting mind, is incapable of contracting ; a married woman, though she may in fact be the moving spirit of the family, is dealt with as under her husband's coercion ; a corporation, though in fact an aggregation of individuals, is dealt with as a single entity. These are recognized as exceptions to the general rule, based upon reason, but technical and arbitrary. In European countries, on the other hand, natural facts and powers of human life are nothing to the law until the law makes them so. If the law will, a man lives ; if it so decree, he dies before the law, though his natural life continues unchanged. If the law endows him with power to speak, to will, to act, he may effectively do so ; if not, then so far as legal results go, his speech is inarticulate, his will a mere

thought, his act is as if never done. Until the law gives a man any capacity, he is not regarded as possessing it. Civil capacity, in short, is altogether a creature of the law, and is dependent, therefore, upon some law having conferred it. Once conferred, the capacity to act becomes a status, continuing until taken away again by the proper law, as may happen by civil death, interdiction, or bankruptcy. This doctrine has been most forcibly defended by Professor Pillet.<sup>1</sup>

"A law once applied to a person," he says, "should be continuous if it is to have every real quality of law. Suppose it ceases to apply to a person when he leaves his own country, or that it only remains inapplicable to such of the person's property as is situated in a foreign country, and it will be clear that the law misses its object because it misses continuity of effect. . . . One can see that if, in the case of the same person, a period of complete incapacity is followed by a period of limited capacity, all the results that the legislator might attain by the rules he established will be forever compromised by the breach of continuity which will be produced in the application of the rule."

Since civil capacity is a status, it must (according to this view) be conferred by the proper law, which is the law of the sovereign who has power over the status. Down to the French Revolution that sovereign was regarded in all European states as the sovereign within whose territories the individual was domiciled; status (including capacity) was governed by the law of the domicil. The framers of the Code Napoléon,<sup>2</sup> however, adopted the law of the nation to which the man owed allegiance, rather than that of his domicil, as the source of his civil rights; and the change has been successively adopted in most of the European codes of the nineteenth century. Belgium and Holland received the Code Napoléon directly; Italy adopted its principles in the Code of 1861;<sup>3</sup> Spain in the Civil Code of 1889;<sup>4</sup> and finally the German empire in the Civil Code of 1900.<sup>5</sup> In most European states, therefore, capacity, once regulated by the law of the individual's domicil, is now regulated by the law of his nation. This doctrine, so clearly set forth in the codes and the treatises of the continent, and stated as if it were to be applied in all cases, is nevertheless subject to many exceptions when actually applied by courts in litigated

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<sup>1</sup> 21 *Clunet's Journal du Droit Internat. Privé* 417.

<sup>2</sup> Section 3.

<sup>3</sup> Preliminary Dispositions, § 6.

<sup>4</sup> Art. 9; so Mexico, Civil Code, Art. 12.

<sup>5</sup> Art. 7.

cases. Where the capacity created by the law of the status appears to be for the benefit of citizens of the forum, the doctrine is rigorously applied ; but where it would operate to the fraud, or even to the disadvantage of citizens of the forum, the courts are quick to find an exception. Thus, in the case of *De Lizardi v. Chaize*,<sup>1</sup> where the defendant was an infant by his own law, though he would have been of age in France, the Court of Cassation said : —

“ It is proper in applying the foreign statute to enforce restrictions and limitations without which there would be constant danger of error or surprise to the prejudice of French citizens. Though on principle one is bound to know the capacity of the person with whom one enters into a contract, the rule cannot be so strictly and rigorously applied with regard to foreigners contracting in France. Civil capacity may in fact be easily verified in the case of transactions between French citizens ; but it is otherwise as to transactions that take place in France between Frenchmen and foreigners. In such a case, the Frenchman cannot be held to know the laws of various nations, and their provisions as to minority and majority and the extent of the power of foreigners to make agreements within the limits of their civil capacity. It is sufficient for the validity of the contract that the Frenchman has acted without laches and negligence and in good faith.”

And in the similar case of *Fourgeaud v. Santo Venia*,<sup>2</sup> the Court of Paris said : —

“ Though the laws which govern the status and capacity of persons follow those persons wherever they go, whatever be their domicil of origin, yet one must remember that the application of the foreign statute is subject to restrictions and limitations required by the legitimate interest of citizens of France who have become such by regular banking operations.”<sup>3</sup>

Indeed, the Supreme Court of Hanover in 1846 stated the rule very much as an American court would now state it.<sup>4</sup>

“ The rule must always be, that a court shall decide according to the law of the land. The exception to this rule, based solely on peculiar

<sup>1</sup> Jour. du Palais, 1862, 427 ; printed in translation in 2 Beale's Cases on Conflict of Laws 34.

6 Clunet 488 ; 2 Beale's Cases 35.

<sup>3</sup> *Acc. Cussac v. Hartog* (Paris, 1883), 10 Clunet 290. In a similar case the Civil Tribunal of the Seine said : “ It is a principle of natural law and of the public order of France that no one shall enrich himself at the expense of another ; such a rule, like laws of police and of safety, binds, without distinction of origin or nationality, all who are on French soil.” 14 Clunet 178.

<sup>4</sup> *Manager of the Court Theatre of Hanover v. G.*, 13 Seuffert's Archiv 10 ; 2 Beale's Cases 33.

usage, according to which the minority of a foreigner is determined by the law of his domicil, cannot be extended in the decisions so as to cover the legal consequences of such minority. The effect of the defendant's agreement, attacked as the contract of a minor, is therefore to be determined by our law."

Such modifications of the express provisions of a code by judicial decisions should always be borne in mind in dealing with foreign codes.

The common law, on the other hand, considering that individuals are by nature endowed with capacity to act, looks at each act and judges the effect of it in view of all its circumstances, including the natural capacity of the particular individual. If, considering all these circumstances, the law, within the jurisdiction of which the act was done, gives it legal effect, no other consideration enters into the case. The question whether consent in fact by a party is legally effective is, therefore, to be determined by the law which has jurisdiction over the act of giving consent, that is, by the law of the place; capacity to act, in short, is determined by the law of the place of the act. Judge Story puts the matter with his usual clearness and accuracy :<sup>1</sup> —

"In regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicil of birth, or the law of any other acquired and fixed domicil, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made, or the act done;" and again,<sup>2</sup> "although foreign jurists generally hold that the law of the domicil ought to govern in regard to the capacity of persons to contract; yet the common law holds a different doctrine, namely, that the *lex loci contractus* is to govern."

So, too, Chief Justice Gray in *Milliken v. Pratt* :<sup>3</sup> —

"It has been often stated by commentators that the law of the domicil, regulating the capacity of a person, accompanies and governs the person everywhere. But this statement, in modern times at least, is subject to many qualifications; and the opinion of foreign jurists upon the subject, the principal of which are collected in the treatises of Mr. Justice Story and of Dr. Francis Wharton on the Conflict of Laws, are too varying and contradictory to control the general current of the English and American authorities in favor of holding that a contract which by the law of the place is recognized as lawfully made by a capable person, is valid every-

<sup>1</sup> Conflict of Laws, § 103.

<sup>2</sup> Ibid. § 241.

<sup>3</sup> 125 Mass. 374.



where, although the person would not, under the law of his domicil, be deemed capable of making it."<sup>1</sup>

This doctrine was until recently the unquestioned law of England;<sup>2</sup> but a tendency is now apparent to hold that capacity depends upon the law of domicil. The first English authority for this doctrine is a dictum of Cotton, L. J., in *Sottomayor v. De Barros*:<sup>3</sup> "It is a well recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil." One cannot speak of this dictum otherwise than as an ignorant error; indeed, Sir James Hannen, in dealing with the same case subsequently in the lower court, said:<sup>4</sup>—

"It is of course competent for the Court of Appeal to lay down a principle which, if it formed the basis of a judgment of that court, must, unless it should be disclaimed by the House of Lords, be binding in all future cases. But I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been 'well recognized.' On the contrary, it appears to me to be a novel principle, for which up to the present time there has been no English authority. What authority there is seems to me to be the other way."

In the latest case on the subject<sup>5</sup> it was left undecided by what law capacity is to be governed. Lord Halsbury, it is true, said explicitly, but obiter, "Capacity to contract is regulated by the law of domicil." Lord Watson expressly declined to decide the point; and Lord MacNaghten, the third member of the court, said: "Perhaps in this country the question is not finally settled, though the preponderance of opinion, here as well as abroad, seems to be in favor of the law of the domicil." In view of these expressions, it is impossible to state the present English law with any confidence; but it is a curious fact that the tendency appears to be to adopt a rule already abandoned in most of the European countries.

Such are the general principles upon which the capacity of

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<sup>1</sup> In France also, until changed by the whim of the codifiers, the law appears to have been the same. Thus in 1624 the Court of Paris upheld a marriage between a Frenchman and a woman of Lorraine, contracted in Lorraine and valid according to the law of that place, though the consent of the man's parents, required by the French law, was not obtained. This, it was said, "was not to be considered, since the marriage was celebrated in Lorraine, a sovereign principality, where the edicts and ordinances of our kings are not observed." If the marriage were invalid, "it would be prodigious and monstrous, since the marriage would be good and valid in Lorraine, and the child legitimate; in France merely concubinage, and the child a bastard." *Journal des Audiences* 16.

<sup>2</sup> *Male v. Roberts*, 5 Esp. 163.

<sup>4</sup> 5 P. D. 94.

<sup>3</sup> 3 P. D. 1.

<sup>5</sup> *Cooper v. Cooper*, 13 App. Cas. 88.



parties is regulated ; but the capacity to marry is perhaps otherwise governed, since it has to do with a relation which is undoubtedly a status. In England, whatever may be the law as to capacity in general, there can be no doubt that capacity to marry is now governed by the law of the domicile. In this case also the English law has only lately taken such a position. In the earlier cases it was treated as unquestioned law that the capacity to marry, like any other question connected with the validity of the marriage, is governed by the law of the place of celebration. This rule was first laid down in connection with Scotch marriages entered into by English minors. In the case of *Dalrymple v. Dalrymple*,<sup>1</sup> Sir William Scott said :—

“The only principle applicable to such a case by the law of England is that the validity of Miss Gordon’s marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland.”

Forty years ago, in *Simonin v. Mallac*,<sup>2</sup> Sir Creswell Creswell had to pass upon a marriage celebrated in England between French citizens without the permission of parents, which is required by the French law. He held the marriage valid, saying :—

“In general, the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such rule does not extend to contracts of marriage, but that parties are, with reference to them, bound by the law of their domicile. This question, of so much importance in all civilized communities, has been largely discussed by jurists of all nations ; but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it is brought in dispute, and of which the parties were domiciled subjects. That a marriage, good by the law of the country where solemnized, should be held good in all other countries, and the converse, is strongly maintained, as a general rule, by nearly all writers on international law. But, according to the same authorities, it is subject to some few exceptions.”

This decision was soon followed by the great case of *Brook v. Brook*.<sup>3</sup> In that case the four Lords agreed that a marriage between an Englishman and his wife’s sister, celebrated in Denmark and valid by the law of that country, was void, but they differed in

<sup>1</sup> 2 Hagg. Consist. 54.

<sup>2</sup> 29 L. J. Pr. 97 ; s. c. 2 Sw. & Tr. 67.

<sup>3</sup> 9 H. L. C. 193.

the reasons given for this decision. Lord Campbell appears to have gone upon the ground that the validity of the contract depends upon "the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated," but he alone took that view. The other Lords, though differing on many points, all agreed that the marriage was void, not because the parties were incapable, but because the marriage was forbidden by the law of England, and in fraud of that law. The present English doctrine was first authoritatively stated in the case of *Sottomayor v. De Barros*, already cited, in which Cotton, L. J., said: "As in other contracts, so in that of marriage, personal capacity must depend upon the law of the domicil;" and this was the *ratio decidendi* of the case.

In this country the view generally held is that expressed by Chief Justice Gray in *Commonwealth v. Lane*:<sup>1</sup>—

"What marriages between our own citizens shall be recognized as valid in this Commonwealth is a subject within the power of the legislature to regulate. But when the statutes are silent, questions of the validity of marriages are to be determined by the *jus gentium*, the common law of nations, the law of nature as generally recognized by all civilized peoples. By that law, the validity of a marriage depends upon the question whether it was valid where it was contracted; if valid there, it is valid everywhere."

Some tendency to depart from this doctrine is shown in a few cases; but they follow *Brook v. Brook*, and are to be explained upon the same ground, namely, that the marriage was in fraud of the law of the domicil.

To sum up the rules as to capacity to marry: On the continent of Europe capacity is usually governed by nationality, though in administering the rule the courts favor their own citizens; in England it is governed by domicil, and in America by the *lex loci*.

So much for the simple question of capacity; the problem becomes complicated when two countries are interested in the matter. Suppose a French man and woman, both domiciled in England, are married in Massachusetts: by the French law their capacity to marry is to be determined by France; according to the English doctrine, by England; according to the Massachusetts rule, by Massachusetts. Or suppose a Frenchman marries a Massachusetts woman in England: the states concerned would not agree

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<sup>1</sup> 133 Mass. 458.

by what law the capacities of the parties are to be regulated. Obviously the validity of the marriage ought to be regarded in the same way by all the countries concerned ; it would be a shocking and immoral thing if the parties might be considered at one moment married, so that the husband could insist upon his marital rights, and at another time unmarried, so that the relation existing between them would be illegitimate. But if one law is to govern the marriage which shall it be ?

The American rule, according to which the capacity of all parties is governed by the law of the place of celebration, avoids the difficulty, without injustice to any party, and without discouraging marriage by interposing any risk of nullity because of some unsuspected provision of a foreign law. Sir Creswell Creswell, in *Simonin v. Mallac*, already cited, forcibly stated the advantages of this rule :—

“ Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country ? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. Now, the law of France is equally stringent whether both parties are French, or one only. Assume, then, that a French subject comes to England, and there marries without consent a subject of another foreign country, by the laws of which such a marriage would be valid, — which law is to prevail ? To which country is an English tribunal to pay the compliment of adopting its law ? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not, then, be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know, and to agree to be bound by ? Again, assume that one of the parties is English, would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law ? But it may be said that, in the case now before the court, both parties are French, and therefore no such difficulty can arise. That is true ; but if once the principle of surrendering our own law to that of a foreign country is recognized, it must be followed out to all its consequences. The cases put are, therefore, a fair test as to the possibility of maintaining that, by any *comitas* or *jus gentium*, this court is bound to adopt the law of France as its guide.”

In countries which govern capacity by the national law of the parties, some working rule must be found to dispose of the case where the parties have different national laws. In Italy it is provided that if either party is incapable by his own law there can be

no marriage.<sup>1</sup> This rule, also, if everywhere adopted, would give a uniform test for the validity of marriages, though it has the disadvantage of favoring invalidity rather than validity. The German doctrine, according to von Bar<sup>2</sup> and Savigny,<sup>3</sup> was that the law of the husband's domicil determined the validity of the marriage; but in the Code of 1900 the German law appears to have been brought into agreement with that of Italy.

Other countries hold a harsher view. Thus, if either party is subject to the French law, that law is applied in the French court, even to the nullifying of a marriage to the harm of an innocent foreigner. Such is the famous case of the Princess de Bauffremont. The Princess, having obtained a judicial separation from her husband in France, became naturalized in Saxe-Altenburg. There a judicial separation granted in a Catholic country is regarded as equivalent to a divorce. She accordingly, without further proceedings, married the Prince de Bibesco, a Roumanian, the marriage being valid by the law of Saxe-Altenburg. The Prince de Bauffremont instituted a suit in the French courts to have the marriage declared null; and all the courts successively so pronounced it.<sup>4</sup> It was admitted that she had the right, after the separation, to acquire a new domicil; though her right to change her nationality without her husband's consent was denied. But the Court of Paris held that "she could not be permitted to invoke the law of the state where she had obtained her new nationality, to avoid the application of the French law, which alone governs the effect of the marriage of its subjects, and declares the tie indissoluble;" while the Court of Cassation remarked, that "acts thus done in fraud of the French law, and in despite of obligations previously contracted in France, could not be set up against the Prince de Bauffremont."

A similar question arose in an Austrian case.<sup>5</sup> One Marie K., married to an Austrian, obtained a judicial separation; she thereupon went to Hungary, was received into the Unitarian Church, was naturalized there, and married another Austrian whose religious and political experience was similar. The first husband instituted a suit in Austria to invalidate the Hungarian marriage;

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<sup>1</sup> 7 Clunet 343. This is also held in France as to a marriage between foreigners in France. 7 Clunet 300.

<sup>2</sup> Internat. Privat- und Strafrecht, sect. 90.

<sup>3</sup> Syst. des Heut. Röm. Rechts, vol. iii. sect. 379.

<sup>4</sup> Dalloz, 1878, ii. 1; 1878, i. 201; Beale's Cases 99.

<sup>5</sup> In re W's Marriage, 25 Clunet 385, 1 Beale's Cas. 428.

but pending a decision he also became a Hungarian Protestant, obtained a divorce, and married again. The Supreme Court, in spite of this defection of the plaintiff, held Marie's second marriage invalid. The husband, the court said, was still an Austrian citizen at the time of the second marriage of his wife, and both he and the second husband possessed landed estates in Austria. "Her second marriage was therefore null, according to the terms of §§ 62 and 111 of the Civil Code, in all countries governed by the Austrian Civil Code."

The same doctrine was applied in England in the case of *Sottomayor v. De Barros*.<sup>1</sup> Two cousins, of Portuguese nationality and within the prohibited degree of consanguinity according to the law of their country, were married in England. The Court of Appeal, believing both parties to have been domiciled in Portugal, held the marriage invalid. On a subsequent hearing in the Probate Division one party was found to have been domiciled in England at the time of the marriage, whereupon the Court held the marriage valid. The other party was domiciled in Portugal, which regarded the parties as incompetent; and in the converse case the English court (as is clear from their opinions, and from the case of *Brook v. Brook*) would have held the marriage invalid.

These cases all contemplate the possibility of a marriage being held good in one country and invalid in another, "a prodigious and monstrous thing." This is the natural, if not the necessary result of determining personal capacity by the proper law of the parties: a doctrine which France complacently regards as a vast improvement on her ancient and antiquated rule of regulating marriages by the *lex loci*.<sup>2</sup> Let us be thankful that the practical good sense of the Common Law has caused us to adhere to the ancient doctrine, and thus make such prodigious monstrosities uncommon with us.

The harshness of the European doctrine is somewhat modified by the fact that not all cases of incompatibility result in absolute nullity. Nullity caused by incapacity of parties may be (as with us) absolute; as where the defect is infancy, bigamy, or incest. Such marriages are avoided by decree of the court.<sup>3</sup> But other nullity is simply relative. Such, for instance, is that caused by failure to accomplish *actes respectueux*, that is, the formal notifica-

<sup>1</sup> 3 P. D. 1; 5 P. D. 94.

<sup>2</sup> "Ces idées surannées." *Pandectes Françaises, Répertoire, Mariage*, 13856.

<sup>3</sup> *D'Hérison v. d'Hérison* (Cass. 1833), *Sirey*, 1833, i. 195; *Jour. du Palais*, 1833, i. 530; *Dalloz*, 1833, i. 129.

tion to parents. Parties who have neglected the provisions of the law in this respect are incapable; but the marriage may, nevertheless, be valid, provided no fraud was intended by the parties upon their national law.<sup>1</sup> Thus in the case of *Lhermite v. Choisi*,<sup>2</sup> where a Frenchman domiciled in Louisiana had there married a Frenchwoman, omitting the *actes respectueux*, had lived with her for several years, and had a child whose legitimacy was attacked in this action, the Tribunal of the Seine said:—

“His union, surrounded by the formalities required in that country, was not clandestine, and in the eyes of every one gave him at once the quality of legitimate husband of Madame Verheydt-Deveux. Under these circumstances it is impossible to find that Choisi, who had reached the age when he could marry without his mother's consent, had the fixed intention, in failing to have *actes respectueux* notified, of concealing his marriage from the French public, and of perpetrating a fraud upon his national law. . . . In such a situation the tribunal would commit an inconceivable excess of rigor, in spite of the wrongs of Choisi towards his family, if it allowed an action which would do so profound an injury to the status of a young girl, a minor, who has up to this time enjoyed the privileges of a legitimate child.”

So where the incapacity is caused by failure to obtain consent of parents, nullity will be decreed only if the parents seasonably object; if after the marriage they accept the situation or fail to object within a limited time, and especially if they expressly recognize it, the marriage is valid to all intents.<sup>3</sup> And so if the parties openly and for a considerable time have “possession of the status” of spouses, their marriage will not be nullified at private suit.<sup>4</sup>

Even if the marriage is really null, it exists in full force until actually nullified by judicial decree; and the court can be set in motion only by a party to the marriage or a relative or other person interested or, in case of a prohibited or clandestine marriage, by a public official. And an innocent party, who has entered into the marriage in good faith without knowledge of the incapacity, is protected to a certain extent by the doctrine of putative marriage.

<sup>1</sup> *D'Hérison v. d'Hérison*, *supra*; *B. v. D.* (Brussels 1898), *Pasic. Belge*, 1899, iii. 261. If there was a desire to evade the national law, the marriage will be null. *Anon.* (Austria 1892), 30 *Samml. von Civ. Entsch.* 229, 21 *Clunet* 1074; *B. v. B.* (Paris 1898), 26 *Clunet* 799.

<sup>2</sup> 27 *Clunet* 350, 2 *Beale's Cas.* 105.

<sup>3</sup> *D'Hérison v. d'Hérison*, *supra*; *Joureau v. Celarié* (French Cass. 1875), *Sirey*, 1875, i. 171; *Journal du Palais*, 1875, 397; *Dalloz*, 1875, i. 482.

<sup>4</sup> *D'Hérison v. d'Hérison*, *supra*; *Joureau v. Celarié*, *supra*; *Lhermite v. Choisi*, *supra*.



As a result of this doctrine, children of such marriage, conceived while one party acts in good faith, are legitimate, and as to an innocent party the putative marriage has the properties and effects of a real marriage. In the case of a Frenchman marrying abroad a foreigner ignorant of his incapacity by his own law, the foreigner would therefore be protected in her rights of property and her children would be held legitimate on the ground that the marriage is a putative one. For "though one is held to know the law of his own country, one cannot be required to know the difficulties presented by a foreign law."<sup>1</sup> As the court of Bordeaux said in such a case, "The marriage having been contracted in good faith by the spouses, or at least by Victoria Fischer, who is not charged with knowledge of the laws of a foreign country, would produce in every respect the civil results of marriage in her favor and in favor of her children."<sup>2</sup> In *Abazaer-Lhérie v. Dunsday-Lhérie*,<sup>3</sup> a Frenchman, married to the plaintiff, met an American girl, the defendant, at Milan and elsewhere, and fell in love with her. She knew of his marriage. He obtained naturalization in Transylvania, joined the reformed church there, and obtained a divorce. The defendant, knowing of the divorce and believing it valid, married him in Transylvania. The plaintiff prayed that the marriage be declared null; and the court so held, on the ground that his naturalization was a fraud on the French law and his divorce invalid. The court also held, however, that the defendant had acted in good faith, and therefore that the marriage was putative.

But the court will not always be so merciful toward the mistake of a foreign spouse. In the case of *Baux v. Countess R.*,<sup>4</sup> a Belgian had married in New York, without obtaining his parents' consent, a young American girl who had been educated in a French convent. The mother of the husband, after his death, brought suit to have the marriage declared null, and the Court of Brussels so declared it. The wife claimed that she had acted in good faith, and that the marriage was putative. The court said: —

"The appellant, though an American, is of French descent; she has

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<sup>1</sup> *Fernex v. Floccard* (Chambéry, 1870), Sirey, 1870, ii. 214; Jour. du Palais, 1870, 895; Dalloz, 1869, ii. 188.

<sup>2</sup> *Charvin v. Charvin* (1850), Sirey, 1852, ii. 561; Jour. du Palais, 1851, ii. 136; Dalloz, 1853, 2, 178.

<sup>3</sup> Dalloz, 1890, ii. 88 (Paris, 1887); see also *d'Argentré v. de Bosmelet* (Rouen, 1887), Dalloz, 1889, ii. 17.

<sup>4</sup> *Pasicrisie Belge*, 1888, ii. 97 (1887).

received a rather complete French education ; she was born November 16, 1862, and was therefore twenty-two years old at the time of the marriage ; she has twice made long visits in Paris ; and under these conditions it is impossible to admit that she could have been ignorant of the fact that René de R. could not marry without his mother's consent. The least experience with European usages is enough to show the difference in this respect between the law of the United States of America and that of France and Belgium."

In view of the principles and cases considered, it is quite unsafe for an American to marry a foreigner without a complete investigation of his capacity to marry according to his personal law.

*J. H. Beale, Jr.*



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THE RESULTS IN THE INSULAR CASES. — Of the last two Insular Cases, decided Dec. 2, 1901, the second Dooley Case is the more important. The plaintiff brought an action to recover for duties collected under the provisions of the Foraker Act levying duties, after the cession of Porto Rico, on goods brought into that Island from the United States, the act further providing that the moneys received should be disposed of for the benefit of Porto Rico, and that the tariff was to cease upon the establishment of a local system of taxation by the legislative assembly of Porto Rico and upon proclamation thereof by the President. 31 U. S. Stat. 77. Mr. Justice Brown delivered the opinion of the Court sustaining the constitutionality of the act, Mr. Justice White delivering a concurring opinion. In both opinions the ground taken is that the word "imports," or "exports," in the Constitution was intended and had always been construed to mean from, or to, foreign countries—that is, in the words of Mr. Justice White, "countries not within the sovereignty nor subject to the legislative authority of the United States;" that since Porto Rico was not such a foreign country, a tax on goods brought into Porto Rico from the United States was not, therefore, a "tax . . . upon articles exported from a state." Furthermore the establishment of temporary provisions such as those in the Foraker Act was supported as an exercise of the "paramount power" to legislate for the territories, especially as moneys collected were to be used for the benefit of Porto Rico. In the dissenting opinion by Mr. Chief Justice Fuller, in which Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Peckham concurred, it was urged that the act was admittedly unconstitutional if Porto Rico remained foreign; that the provisions could not be sustained if the Island became domestic, since then the goods were not imported into Porto Rico from a foreign

country and since Congress is given power to levy duties only on imports from foreign countries; and that the act violated the intention indicated by the Constitution both to prevent discrimination between different parts of the country and to deny to Congress the power of taxing goods sent out of the country irrespective of the place of destination or of the place where the duties might be collected. It was further suggested that if the "export clause" protected goods going to foreign countries only, there was nothing to prevent the taxation of property sent from state to state. In reply to this, however, it was intimated in the opinion of the Court that the power to regulate interstate commerce is far more restricted than the power to legislate for the territories and that a tax such as that suggested might not comply with the "uniformity clause."

In the remaining case, *The Diamond Rings Case*, the government contended that rings brought into this country from the Philippines without the payment of duties, after the ratifications of the treaty had been exchanged, were liable to forfeiture under the provisions of the Dingley Act providing for the forfeiture of goods so imported from "foreign countries." In the attempt to distinguish the status of the Philippines from that of Porto Rico it was urged, in the first place, that the former remained foreign, since at the time of the cession there existed armed resistance to the sovereignty of Spain. But the Court decided that the title of Spain was not thereby affected and that the government, when suppressing an insurrection as a resistance to its lawful authority, could not at the same time contend that the cession did not pass full title to the Islands. It was further insisted for the government that the Islands remained foreign, since, after the exchange of ratifications, the Senate passed a resolution to the effect that "by the ratification . . . it is not intended . . . to permanently annex" the Philippines. It was decided, however, that such a resolution, at least when not assented to by the House of Representatives nor signed by the President, did not indicate and could not alter the intention to be drawn from the treaty. As the status of the Philippines was therefore essentially the same as that of Porto Rico, the Court followed the decision rendered last spring in *De Lima v. Bidwell*, 182 U. S. 1 — that such imports were not subject to the payment of duties imposed on imports from "foreign countries."

Several propositions seem established by the six decisions thus far rendered. An Act of Congress imposing duties on imports from "foreign countries" does not authorize the collection of duties on imports from territory ceded to the United States. *De Lima v. Bidwell*, 182 U. S. 1. *The Diamond Rings Case*, decided Dec. 2, 1901. See 15 HARV. L. REV. 168. Yet an Act of Congress specifically imposing duties on imports from the ceded territory does not violate Art. I., sect. 8, § 1 of the Constitution, requiring that "all imports, duties and excises shall be uniform throughout the United States." *Downes v. Bidwell*, 182 U. S. 244. See 15 HARV. L. REV. 164. On the other hand, until a treaty of peace is ratified the United States military authorities have power to impose duties on articles from the United States brought into territory of the enemy under military occupation. *Dooley v. U. S.*, 182 U. S. 222. After the exchange of ratifications, however, in the absence of Congressional action such goods are entitled to entry into the ceded territory free of duty, the orders of the President imposing duties being void as to imports from the United States, although (*semble*) valid as regards those from other countries. *Dooley v. U. S.*, 182 U. S. 222. See 15

HARV. L. REV. 220.<sup>1</sup> Nevertheless an Act of Congress temporarily imposing duties on articles brought into such territory from the United States, and providing that the proceeds should be used for the benefit of the territory ceded, does not violate Art. I., sect. 8, § 5 of the Constitution, requiring that "no tax or duty shall be laid upon articles exported from any state." *Dooley v. U. S.*, decided Dec. 2, 1901. The remaining case, upon the construction of certain acts of Congress and New York statutes, decided that a ship licensed to trade between New York and Porto Rico was engaged in a "coasting trade," and not being "from a foreign port" was not by the statute required to employ a pilot on entering New York harbor. *Huus v. N. Y., etc., Co.*, 182 U. S. 392. Under similar facts it would seem that the same doctrine must apply to a ship trading between this country and the Philippines.

These decisions establish clearly that Congress has a large discretion in legislating for the new possessions. While all the members of the Court seem of the opinion that such legislation is not absolutely free from restraint, the reasons supporting the conclusion differ so greatly that the extent of the restraint is entirely an open question. Furthermore, since but few clauses of the Constitution have been interpreted and since the conclusions are supported by a bare majority, the final determination of the exact legal status of the new possessions may still be thought a matter of considerable doubt.

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RECOVERY IN ASSUMPSIT OF MONEY DUE IN FUTURE. — A recent decision in a United States Court of Appeals, raises a perplexing question in damages for breach of contract. A federal statute requires all persons having building contracts with the government to furnish a bond conditioned for the "prompt payment" of material-men, and authorizes suit on the bond by the beneficiaries. By contract between the defendant, an obligor on a bond of this kind, and the plaintiff, a material-man, eighty per cent of the contract price of materials furnished each month was payable on the first of the following month, and the remaining twenty per cent when the building was completed. The defendant made several defaults in the eighty per cent payments, and the plaintiff abandoned the contract and sued at once on the bond. "Prompt payment" was construed as meaning payment when due, and it was held that the full contract price could be recovered upon the ground that the deferred twenty per cent fell due at once on breach by the defendant and refusal by the plaintiff to proceed. *Mullin v. United States*, 109 Fed. Rep. 817 (C. C. A., Second Circ.).

Since the action is on the bond it does not appear whether the amount recovered is based on the express contract or on a *quantum meruit*. A material breach by one party to a contract gives the other party the right to rescind and sue in quasi-contract, or to refuse to perform further and sue on the contract for damages. 14 HARV. L. REV. 317, 421. Strictly the right to rescind exists only when both parties are restored to their former position, and in England the right is kept well within these limits. *Hunt v. Silk*, 5 East 449. In America the injured party may generally rescind when he can and does restore or offer to restore every-

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<sup>1</sup> In this last case the Court seems to rest the decision upon the ground stated; yet it is possible that the case did not necessarily involve anything more than a construction of the President's orders as intended to apply only to imports from "foreign countries."

thing that he has received under the contract. *Miner v. Bradley*, 22 Pick. (Mass.) 457. Rescission terminates the contract, and the obligation then resting on the other party is that of restitution *in specie* or in value. KEENER, QUASI-CONTS., 286. If the measure of damages in the principal case is based on this quasi-contract, the plaintiff, on being required to return all benefits received, should have recovered only the actual value of the materials furnished. The court, however, allowed him to recover the contract price and damages for the breach. In the quasi-contractual action after rescission neither damages for breach nor the contract price as such ought to be recovered; for the action has no relation whatever to the express contract. The price fixed by the contract would merely be evidence of the actual value. KEENER, *supra*, 289.

If the measure of the plaintiff's recovery is the damage sustained by breach of the express contract it is more difficult to see how the deferred payments can be said to be due before the time fixed by the contract. See *Miller v. Wilson*, 24 Pa. St. 114. Breach by one party and refusal by the other to proceed does not put an end to the contract. It still exists, but the injured party has an excuse for future non-performance. 14 HARV. L. REV. 425. The injured party has as yet suffered no damage as to the future payments, nor is he deprived of his action for them when they shall be due. The contract is indivisible, and the breach being material, the question is entirely one of damages. In cases where the present complete payment does not impose on the party in default too great a hardship there would seem to be strong grounds of expediency in favor of concluding the whole matter in one action. Moreover, in jurisdiction recognizing the doctrine of anticipatory breach as justifying full recovery at once, the breach may sometimes be construed as a repudiation of the future obligation.

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A MORTGAGOR AS SURETY FOR HIS ASSIGNEE. — There is some difference of opinion as to the rights and relations of the interested parties where the purchaser of land from a mortgagor assumes the mortgage debt. Two late cases are of interest as involving these relations. In one the mortgagee agreed with the buyer to extend the time of the mortgage. After this time had elapsed he sued the mortgagor on his original covenant, and was allowed to recover since the mortgagor's remedies were not actually impaired when he had occasion to use them. *Forster v. Ivey*, 21 Can. L. T. 550. In the other case, the land failing to satisfy the mortgage debt on foreclosure, the mortgagee obtained judgment against the mortgagor for the balance. The latter sued in equity to force his assignee to perform his promise to pay, and was refused relief, and left to his remedy at law. *Thompson v. Lodge*, 58 Leg. Intell. 428 (Phila. Co.). Now what is the relation between the mortgagor and the buyer? As between themselves the assignee is usually regarded as the principal for whom the mortgagor is the surety. *Poe v. Dixon*, 60 Oh. St. 124. Although, as will be pointed out later, it seems that a true case of suretyship does not exist, a very similar relation is created. Certainly the buyer is expected to pay the debt, and the mortgagor is to pay only on his default. If the mortgagor pays he is entitled to a transfer of the premises from the mortgagee, to whose rights he is subrogated, and he can foreclose the mortgage or recover over against his assignee on the latter's promise to pay the debt. *Hart v. Chase*, 46 Conn. 207. As to the buyer then, he has the rights of indemnity and subrogation, which be-

long to a surety. Now a surety can in equity force his principal to pay the debt. *Bishop v. Day*, 13 Vt. 81. Every reason for allowing such a suit appears to apply with equal force here. Clearly the legal remedy is inadequate. Consequently it is not easy to uphold the Pennsylvania case. It is true that there is a state statute on which the case may be supported, but on this the court did not rely.

As to the Canadian case it is necessary to look further. Is the mortgagor a surety of his purchaser as to the mortgagee? At once it appears that under ordinary principles of contracts there is no principal legal obligation from the purchaser to the mortgagee, and so the purchaser can never be in default to the mortgagee. Although the latter can reach the obligation of the purchaser in equity, he has no rights against him at law, except under the anomalous doctrine that the beneficiary of a promise may sue. See 14 HARV. L. REV. 462; 12 HARV. L. REV. 139. Consequently, as to him it seems there is no real suretyship. It is true that if one of two joint debtors, by an arrangement with the other, becomes simply a surety for him, the creditor with notice of this is bound just as if the two were originally principal and surety, and any giving of time to the principal discharges the surety. *Rouse v. Bradford Banking Co.*, [1894] A. C. 586. But in that case there is an actual primary liability on the other debtor still existing. In the case under consideration it may be said that after notice the creditor should look first to the land and its owner for his debt. But the creditor has never agreed to accept the land as his primary debtor. It seems then that though a very similar relation exists, there is not a true suretyship. Nevertheless most of the cases have been decided as if there were a true case of suretyship, either to the extent of the whole debt, if the buyer promised to pay, or to the extent of the value of the land, in the absence of an express promise, and so the mortgagor has been held discharged to this amount by the slightest giving of time to the purchaser. *Commercial Bank v. Wood*, 56 Mo. App. 214; *Travers v. Dorr*, 60 Minn. 173; *Murray v. Marshall*, 94 N. Y. 611. See, *contra*, *Corbett v. Waterman*, 11 Ia. 86. Certainly the same injury to the mortgagor results from the giving of time as would result to a surety, for the creditor has similarly barred his own rights, and so, in the principal case, cannot transfer the right to foreclose to the mortgagor if he makes payment. It is true that at first sight there is no very evident equity in discharging one who suffers no damage. It is submitted, however, that the rule as to discharge by giving time is merely part of the broader rule that any variation of the surety's risk which may injure him to an amount that cannot at the time be ascertained discharges him. This rule has been found necessary to protect the surety, and seems no less necessary to the protection of the mortgagor; nor does the partial difference between the positions of the two suggest any reason for a distinction in this respect. But see *Denison University v. Manning*, 61 N. E. Rep. 706 (Ohio). The Canadian decision, therefore, in refusing to follow the rule of suretyship, seems unfortunate.

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THE EXTENT OF THE POWER OF EMINENT DOMAIN. — A suggestion as to the purposes for which the power of eminent domain may be constitutionally exercised is furnished by a recent case in the Indian Territory. *Tuttle v. Moore*, 64 S. W. Rep. 585 (I. T., C. A.). An Act of Congress,



appropriating Indian lands to be sold to individuals as town lots in accordance with a general town-site scheme, was sustained on two grounds: first, that it constituted an exercise of the control delegated to Congress over Indian tribes; second, that it was a taking for a public use, and so a legitimate exercise of the power of eminent domain within the Constitution, it being assumed that such action in the territories was governed by the provisions of that instrument. One judge, while concurring in the result, thought that the taking was not for a public use, and so dissented from the second ground.

The power of eminent domain is inherent in sovereignty. *United States v. Jones*, 109 U. S. 513. There is always a moral duty to give compensation, and to exercise the power only for public purposes. It is only when this moral duty is made a legal one by constitutions that the judiciary may have a voice in the matter. See note in 1 Thayer, *Cas. Const. Law*, 952. This limitation, as regards the Federal Government, is found in the Fifth Amendment, and, as regards the States, in similar provisions in the state constitutions. What constitutes a public use, as therein provided, has been the subject of many conflicting opinions. Many authorities would confine it to some actual use or enjoyment by the public of the *res* taken. *Board of Health v. Van Hoesen*, 87 Mich. 533; 1 LEWIS, EM. DOM., § 163. The sounder and more liberal view extends it to whatever is of benefit to any considerable portion of the public, as regards health, material prosperity, or other welfare. *Talbot v. Hudson*, 16 Gray (Mass.) 417; Walworth, C., in *Beekman v. Saratoga, etc., R. R.*, 3 Paige (N. Y.) 45, 75. Accordingly, the power has been exercised for such purposes as the flowage of land by mill dams, the laying out of a national park, the benefit of mining interests, etc. *Olmstead v. Camp*, 33 Conn. 532; *United States v. Gettysburg, etc., Ry. Co.*, 160 U. S. 668; *Overman, etc., Co. v. Corcoran*, 15 Nev. 147. It is often said that, although the necessity or expediency of the exercise of the power lies wholly in the discretion of the legislature, the question whether the use is in fact a public one is for the courts. *Matter of Deansville Cemetery Association*, 66 N. Y. 569; 1 Lewis, Em. Dom., § 158. According to the more accurate view, however, the whole question is for the legislature, controlled by the courts only where there is a palpable abuse. 2 KENT, COM., 12 (Holmes') ed., 340 (a)<sup>1</sup>; *Hazen v. Essex Co.*, 12 Cush. (Mass.) 475; see also *Olmstead v. Camp*, *supra*. Therefore it would seem that, since the question is a legislative one and the legislature has declared the purpose to be public by the very exercise of the power, it is only when it is unreasonable to consider the purpose public that the judiciary can declare the action of the legislature unconstitutional. In other words, the legislature exceeds its power only when its action is merely arbitrary, and it is only where it exceeds its power that the courts can intervene. See 7 HARV. L. REV. 129, 148.

The court however may well be more strict in construing a statute delegating the power of eminent domain to a corporation, since then the question relates not to the power of the legislature, but to the authority that has in fact been conferred by the legislature. See note in 1 Thayer, *Cas. Const. Law*, 673.

It is apparent that a taking of unimproved land for town-site purposes might well be of inestimable benefit to any sparsely settled or slightly developed region; and, though the needs and circumstances of the community must always be taken into consideration, it is difficult to say that,

even in a more fully developed locality, such a taking would be so clearly unwarranted and arbitrary as to be declared unconstitutional. The suggestion of the court in the principal case would seem, therefore, to be based on sound reason and a liberal conception of the legislative power.

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THE ASSIGNMENT OF A CLAIM ALREADY PARTIALLY COLLECTED BY THE ASSIGNOR'S AGENT. — Some interesting questions are raised by a recent decision in the New York Court of Appeals. *Curtis v. Albee*, 167 N. Y. 360. The plaintiff assigned to the defendant a claim against an insolvent as "a claim for an unpaid balance of \$2000." Unknown to both parties, at the time of the assignment about \$800 had been paid upon the claim by the insolvent's assignee to the attorney of the plaintiff. The defendant afterwards learning of this payment induced the attorney to turn over to him the money thus collected, and the plaintiff brought an action for a reformation of the contract of assignment and other equitable relief. In denying that the plaintiff was entitled to any relief against the defendant, the court took the position that the attorney was still indebted to the plaintiff, and the defendant apparently indebted to the attorney, but that the defendant owed nothing to the plaintiff directly.

The *dictum* that the transfer of a claim does not carry with it payments made without the knowledge of the assignor before the transfer is clearly sound. A contrary result, however, was effected by the construction of an instrument of assignment in an essentially similar case. *Klock v. Buell*, 56 Barb. (N. Y.) 398. Assuming that the assignment passed to the defendant no interest in the money wrongfully paid over to him by the attorney of the plaintiff, the decision that the plaintiff cannot recover it from him directly seems to be undesirably technical. The money, when paid to the attorney, was held by him in trust for the plaintiff. *Frost v. M' Carger*, 14 How. Pr. (N. Y.) 131. If he kept the money apart from his own funds until he paid it to the defendant, it is the simple case of trust funds paid to a volunteer with notice. If he wrongfully mingled the amount with his own funds, he stood in the position of a debtor to the plaintiff. *Nevius v. Disborough*, 13 N. J. L. 343. But upon his designating certain money as that belonging in equity to his principal there seems to be no good reason why the latter should not be permitted to claim it as trust funds, and follow it into the hands of a volunteer. Such in effect was the decision in *Matter of Le Blanc*, 75 N. Y. 598.

Although the decision in the principal case in denying the assignor a direct recovery from the assignee cannot be supported upon the reasoning advanced, the result seems equitable upon grounds apparently not presented in argument. The assignor of a claim impliedly warrants that it is an existing and valid claim for the amount specified. *Gilchrist v. Hilliard*, 53 Vt. 592. The measure of damages for the breach of this warranty is the difference in value of the claim as actually transferred and as represented. *Bennett v. Buchan*, 61 N. Y. 222. In the principal case the value of the plaintiff's claim against his debtor became fixed upon the latter's insolvency. The difference between what the defendant received upon the claim as actually transferred, and what he would have received upon the claim as described, is measured by the sum paid to the plaintiff's attorney before the assignment. A recovery of that amount by the plaintiff in this action would be followed by a recovery

of the same amount by the defendant in an action upon the implied warranty. Equity to avoid circuitry of action should leave the parties in their present position. *Dodd v. Wilson*, 4 Del. Ch. 399. It will be remarked that the same conclusion follows in a case where the debtor was solvent at the date of the assignment, but in a case where his insolvency intervened between the payment and the assignment a different result would be reached.

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CONSPIRACY TO INJURE IN BUSINESS.— Few questions have given rise to more litigation than those concerning combinations of capital or labor. A recent case before the Supreme Court of Wisconsin squarely presents the issue: Can acts, which are lawful for an individual, become unlawful or actionable, when done by a confederacy? *Hawarden v. Youghioghney, etc., Co.*, 87 N. W. Rep. 472 (Wis.). Certain wholesale dealers in substantial control of the local coal supply and certain retail dealers agreed to trade exclusively with one another for the purpose, among others, of forcing out of the trade those retailers not in the combination. In pursuance of this agreement the defendant conspirators refused to sell to the plaintiff, whose business was thereby destroyed. On demurrer to the declaration the court decided there was a cause of action at common law.

There can be no doubt that each defendant singly had the legal right to refuse to sell to the plaintiff. Such discrimination could be exercised by an individual, although he had a practical monopoly. See *Brewster v. Miller*, 101 Ky. 368. The motive also is immaterial, for the right to discriminate is regarded as an absolute right, except in the cases of public servants such as carriers, telegraph companies, etc., under which category coal dealers do not fall. *Opinions of the Justices*, 155 Mass. 598. If an act is not tortious, when done by one it is said to follow logically that it cannot be tortious, when done by several, and on this reasoning, the decisions *contra* to the principal case are based. *Hunt v. Simonds*, 19 Mo. 583; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223 (*semble*).

But is it true that the concerted refusal to deal with a man is precisely the same act as the refusal of an independent individual? Andrews, J., in *Leathem v. Craig* declares, "Their commission [*i. e.* acts] by the concerted action of a number materially alters their character in this respect at least, that they thereby become more formidable, more oppressive, harder to resist, and therefore more generally dangerous; and this independent of motive." *Leathem v. Craig*, [1899] L. R. Ir. 2 Q. B. D. 667, 676; *s. c.* *Quinn v. Leathem*, [1901] A. C. 495. This distinction seems valid. Nor is the force of it destroyed by the fact that in some one particular instance an individual may have more power to injure than an associated number. It is not merely the addition of combination, but the alteration in the character of the acts done, which explains the liability of the defendants. Moreover, their agreement of necessity involves the inducement of each party to it by the others not to deal with the plaintiff. The right to influence another to the damage of a third person is, under the modern conception of the law of torts, unquestionably a qualified right the exercise of which, if exerted to injure a third person, demands justification. *Plant v. Woods*, 176 Mass. 492. See 8 HARV. L. REV. 1. Though the cases are in undoubted conflict, there is authority as well as reason to qualify the general proposition, that what an indi-



vidual may lawfully do, several may combine to do. *Gregory v. Duke of Brunswick*, 6 M. & G. 953; see 1 EDDY, COMB., §§ 474, 501. This qualification does not mean that every confederacy which causes pecuniary loss must respond in damages to the injured party. Fair business competition is an universally recognized justification. *Mogul Co. v. McGregor*, [1892] A. C. 25. The line between "fair" and "unfair" competition cannot be drawn rigidly, but it would seem that such facts as those in the principal case ought generally to amount to a justification. See *Bowen v. Matheson*, 14 Allen (Mass.) 499. The demurrer admitted that one purpose of the defendants was to injure the plaintiff. If that had been their sole purpose the combination would be unlawful. But in all "fair" competition the infliction of injury is contemplated and therefore intended, though as incidental to self-advancement. The decision is perhaps attributable to the prevalent feeling against monopolies as evidenced by Wisconsin legislation.

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THE TITLE TO CERTIFICATES INDORSED IN BLANK. — It is well known that even a thief can give a *bona fide* purchaser a good title to money, bank bills or currency in any form. On the other hand a thief can never pass good title to stolen chattels. The reason for this distinction rests in the fact that expediency requires that the title to any medium of exchange should pass with possession. There is an intermediate class of instruments, including, for example, certificates of stock payable to bearer or indorsed in blank. These instruments are not negotiable, a mere thief cannot make a valid transfer of them, and yet, unlike chattels, one entrusted with their possession can pass a good title. *Jarvis v. Rogers*, 15 Mass. 389; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194. The question as to what is a sufficient entrusting has arisen in rather a curious way lately in Massachusetts. The owner of two certificates of indebtedness indorsed in blank left them in a sealed envelope with brokers for safe keeping. The brokers, knowing of the contents, subsequently tore open the envelope, and pledged the certificates for their own debts. They were sold under this pledge to the defendant, who bought without notice, and who was then sued by the original owner in trover. The court was ready to apply the rule that one entrusted with possession could pass title if it had been found that such was the custom, for the rule rests on the theory that one who has given all the indicia of title to another cannot assert title against a buyer in good faith from the latter. But the court held that although there was evidence of entrusting the envelope there was no evidence of entrusting the certificates. *Scollans v. Rollins*, 60 N. E. Rep. 983 (Mass.). In support of this finding is cited the ancient doctrine of larceny by breaking bulk. The doctrine is that if a package of goods is delivered to a bailee, and he separates them, and disposes of them he commits larceny. *Commonwealth v. Brown*, 4 Mass. 580. Of course the difficulty in such a case is to find the taking of possession against the will of the owner, which is a necessary element of larceny. The doctrine is ordinarily explained by means of the fiction that the bailee in breaking bulk ends the bailment and by the same act takes possession wrongfully. 2 East, P. C., 695; 3 GREENL., EV., § 162; *Commonwealth v. James*, 1 Pick. (Mass.) 375. It is true, under this view of the doctrine, that by a fiction the bailee subsequently lost possession, and

wrongfully retook it. His possession at the time of sale had not been entrusted so that he could not pass title to the defendant. Clearly, however, this fiction in no way renders the plaintiff more deserving, and it should not alter the actual fact that the brokers never lost possession. By the plaintiff's delivery the brokers were given that real possession which ultimately enabled them to make the sale. Under these circumstances, this fiction of the criminal law established for a wholly different purpose, should not be invoked to the prejudice of a *bona fide* purchaser.

The court rests its decision, however, upon another theory of the doctrine of breaking bulk. One judge alone in the case in which that doctrine originated, and a Massachusetts judge by way of *dictum*, explain the rule on the ground that the bailee never is given possession of the contents of the package. *Carrier's Case*, Y. B. 13 Edw. IV. 9, *pl.* 5, per Choke, J., *Belknap v. National Bank of N. A.*, 100 Mass. 376, *per* Chapman, C. J. As has been indicated, this view is opposed to the great weight of authority. It does not accord with the actual facts, and is at most a fiction, like the other view of the doctrine. Consequently as a basis for a decision it is unsatisfactory.

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THE LIABILITY OF BUCKET SHOPS AS CONSTRUCTIVE TRUSTEES. — The rule is well recognized that where a defendant aids in a breach of trust while acting in good faith and with the trustee's authority, his liability to the *cestui* is limited to making restitution for the benefit actually received. *Florence, etc., Co. v. Zeigler*, 58 Ala. 221; *Bonesteel v. Bonesteel*, 30 Wis. 516. A recent Court of Appeals decision involves the application of this doctrine to a novel set of facts. *Bendinger v. Central, etc., Exchange*, 109 Fed. Rep. 926. Without notice of the trust a bucket shop received misappropriated trust funds as margins. After the payment of profits to the trustee, the whole was finally "wiped out" when the market fell. In a suit against the bucket shop the *cestui* was allowed to recover the total amount advanced without deducting the profits returned to the trustee. The *ratio decidendi* is that as the transactions were outlawed by a statute, which also allowed the recovery of money lost in gambling, the defendant became a trustee *de son tort* from the moment of receiving the original funds. Had the transactions been legitimate, that is, had the margins been lost through a depreciation in investments actually purchased, the defendant would have been protected, as he would have retained no part of the trust *res*. *Dunlap v. Limes*, 49 Ia. 177. On this reasoning it might seem that the defendant in the principal case ought not to be responsible for the money returned to the trustee. But the defendant, while purporting to pay profits, was as an actual fact merely paying a lost bet. On somewhat similar facts an English case holds that when the defendant makes fictitious entries he cannot later plead that they are untrue. *Rapp v. Latham*, 2 B. & Ald. 795. It might seem therefore that the defendant here cannot maintain that the repayment to the trustee "as profits" is a part of the principal. This reasoning is not adopted in the principal case, however, the language of which denotes an intention to punish the defendant merely as a law breaker. The result of the position taken by the court makes a party with no knowledge of the trust absolutely liable to the beneficiary from the moment

he receives the funds ; and to be consistent the court would have to go so far as to hold that even if the defendant had actually and in good faith repaid the principal to the trustee he would still be liable to the *cestui*. This is introducing a new element into the law of constructive trusts, which has heretofore limited the liability of a constructive trustee acting in good faith to the amount of benefits actually received. *Florence, etc., Co. v. Zeigler, supra*. Furthermore the contention is unsound that "an act that is criminal and void cannot be said to be founded upon good faith." The term good faith as used in this class of cases means ignorance of the beneficiary's equity, and no amount of criminality on the defendant's part can transform this ignorance into fraudulent knowledge. Although the reasoning of the court is careless, the result may well be beneficial in discouraging bucket shops. The actual decision however may be supported either on the doctrine of *Rapp v. Latham, supra*, or possibly by construing each repayment of so-called "profits" as a closing of one transaction, and a reinvestment of the original sum advanced, and the latter would therefore represent the actual benefit to the defendant. The court appealed from gave judgment in favor of the plaintiff for the amount of the margins less the amount returned to the trustee. On the whole, this decision seems more equitable than that of the upper court, and more in accord with the general rule in regard to constructive trustees.

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COMPULSORY PILOTAGE. — It is by no means settled what effect statutes requiring the employment of licensed pilots have upon the liability of the owner for the negligence of such pilots. In a recent case where the defendant's vessel, while under the command of a New York licensed pilot and wholly through his fault collided with a pier owned by the plaintiff, the court held that the defendant was not liable in an action at common law, upon the ground that he was not personally at fault and that, as the employment of the pilot was compelled by the New York statute, the defendant could not be made responsible as principal. *Homer Ramsdell Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406. This result in an action at law seems obviously correct. Yet the injured party may also have alternative remedies in admiralty, and since his rights are then governed by the principles of maritime law, it is by no means necessary that the same result should be reached. A libel *in rem* is based upon the distinct conception that the right to redress is against the ship itself ; in other words that the ship is the offending person regardless of the fact under whose control it was at the time of the collision. As culpability may thus be fixed upon the ship it has consequently been held in the United States that a libel *in rem* will be sustained under such circumstances. *The China*, 7 Wall. 53. In England, after many conflicting decisions the opposite conclusion has been reached. *The Halley*, L. R. 2 P. C. 193. Although perhaps a trifle harsh the American rule is a logical outcome of the principles of maritime law ; it is furthermore supported by the law of continental Europe. 5 LYON-CAEN ET RENAULT, DROIT COMMERCIAL, §§ 190, 190 bis. In the remaining alternative open to one injured under such circumstances — a libel *in personam* against the owner — the peculiar doctrine which allows recovery where the ship is libelled *in rem* can have no application, and the same result should be reached as in an action at law. See CURTIS, MERCHANT SEAMEN, 196.

As to what constitutes compulsory employment however, the provisions of the statutes vary so greatly that no uniform rule can be deduced from the cases. Thus a New York statute, providing that any unlicensed person piloting a vessel to or from the port of New York shall be deemed guilty of a misdemeanor punishable by fine or imprisonment, has been held to make the pilotage compulsory. *The China*, *supra*. The Massachusetts statute, on the other hand, provides for a forfeiture of the whole pilotage fees if a tender of services is refused, and that of Louisiana inflicts a penalty of one half the fees; both statutes have been regarded in *dicta* as not compulsory. *Martin v. Hilton*, 9 Met. (Mass.) 371; *The Merrimac*, 14 Wall. 199. The same result was reached under a Pennsylvania statute by which a master is "required and obliged" to employ a pilot or forfeit one half the fees to a charitable organization. *Flanigen v. Washington Ins. Co.*, 7 Pa. St. 306. In England the forfeiture of the fees is generally held to make the pilotage compulsory. *The Maria*, 1 W. Rob. 95. Yet curiously enough a penalty of double the fees has been interpreted in the opposite. *Attorney-General v. Case*, 3 Price 302. A vague distinction has been attempted in these cases between the forfeiture of pilotage fees and a "penalty." STORY, AGENCY, 2nd ed., § 456a. It is impossible from such a conflict to determine a satisfactory rule; it seems, however, that American courts do not consider a provision as obligatory unless its breach is punishable as a misdemeanor. Certainly the interpretation of the Pennsylvania statute is an indication of such an intention.

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## RECENT CASES.

AGENCY — COMPULSORY PILOTAGE — NEGLIGENCE OF PILOT. — The defendant's vessel, under command of a licensed pilot, collided with the plaintiff's pier as a result of the pilot's negligence. The latter was employed under a New York statute which the court interpreted as compelling the employment of a pilot. The plaintiff sued for injury to his property. *Held*, that the defendant is not liable. *Homer Ramsdell Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406. See NOTES, p. 405.

AGENCY — MASTER AND SERVANT — INTENTIONAL ACT OF SERVANT. — A push-car belonging to a railroad company was in charge of a foreman who lent it after the day's work to X for the latter's own use. The plaintiff, while lawfully crossing the track, was injured by the negligence of X in running the push-car. *Held*, that the company is liable. *Erie R. R. Co. v. Salisbury*, 50 Atl. Rep. 117 (N. J., C. A.).

The act of the foreman was not merely a performance of the company's business in an irregular and unauthorized way; it clearly was entirely outside the scope of his employment, so that the company could not be held liable for the consequences of this as an affirmative act. *Robinson v. McNeill*, 18 Wash. 163; *cf. Fiske v. Enders*, 47 Atl. Rep. 681. In certain classes of cases, however, the master is under a duty to prevent certain things from happening, and if the servant to whom that duty is delegated, himself wrongfully causes one of those things to happen, the master may be held responsible, not for the doing of the act by the servant, but for the failure of the servant to prevent its being done. On this principle a railway company is liable for a wilful assault on a passenger by a train hand. *White v. Norfolk, etc., R. R. Co.*, 115 N. C. 631. The doctrine applies to the custody of dangerous instruments such as torpedoes. *Pittsburgh, etc., Ry. Co. v. Shields*, 47 Oh. St. 387. The principal case might be supported on this basis, but the doctrine has never been applied to the custody of non-dangerous instruments, and a closely analogous case held very reasonably that a push-car belongs to the latter class. *Branch v. International, etc., Ry. Co.*, 92

Tex. 288. No other ground is apparent on which to rest the decision of the principal case, which is therefore difficult to support.

**BANKRUPTCY — PETITION OF CREDITORS — JOINING IN PETITION TO CURE DEFECT.** — Under § 59 *b* of the Bankruptcy Act of 1898 "Three or more creditors who have provable claims against any person which amount . . . to five hundred dollars . . . may file a petition . . ." Under § 3 *b* "A petition may be filed . . . within four months after the commission of . . . [an] act [of bankruptcy]." § 59 *f* provides that "Creditors other than original petitioners may at any time . . . join in the petition . . ." Creditors whose claims amounted to less than five hundred dollars filed a petition against the defendant, and subsequently, more than four months after the alleged act of bankruptcy, other creditors sought to join in the petition in order to supply the deficiency. *Held*, that under § 59 *f* they may join and thereby validate the original petition. *In re Mackey*, 110 Fed. Rep. 355 (Dist. Ct., Del.).

Although by its express terms § 59 *f* may not provide for correcting a defect in the original petition, still the natural object of a clause permitting a joinder of other parties would seem to be to allow an original insufficiency to be thereby remedied. See *In re Romanow*, 92 Fed. Rep. 510. It would consequently seem proper to construe § 59 *f* as if the words "in order to validate the petition" were inserted. This construction is justified moreover by its results, for otherwise the filing of a petition, apparently valid but in fact defective, might cause other creditors to refrain from petitioning until too late. This interpretation avoids any objection on the ground that the other creditors joined more than four months after the act of bankruptcy. The petition was filed within the time required by § 3 *b*, and § 59 *f* expressly provides that other creditors may join "at any time." *In re Romanow*, *supra*, holding that a defect in the number of petitioning creditors may be cured by subsequent joinder, appears to be the only decision in point.

**BANKRUPTCY — SURRENDER OF PREFERENCES — TIME OF RECEIPT.** — The Bankruptcy Act of 1898, § 57 *g*, provides that "The claims of creditors . . . shall not be allowed unless . . . [they] surrender their preferences." In § 60 *a*, where certain judgments and transfers are declared to be preferences, no time is set within which such judgments or transfers must have been secured. A creditor who had received a preference more than four months previous to the filing of the petition against a bankrupt, sought to prove the remainder of his claim. *Held*, that he must surrender such preference before proving his claim. *In re Abraham Steers Lumber Co.*, 110 Fed. Rep. 738 (Dist. Ct., S. D. N. Y.).

There appears to be no contrary decision on the point, but earlier cases, in which the preference was given within four months, laid some stress on that fact. *In re Fort Wayne Electric Corp.*, 99 Fed. Rep. 400. A literal construction of §§ 57 *g* and 60 *a* undoubtedly leads to the conclusion reached by the court. It has however been contended that the effect of § 60 *a* is limited by other sections of the act, and especially by § 60 *b*, which makes voidable by the trustee preferences given, within four months before the filing of a petition, to one having reasonable cause to believe a preference was intended, thus imposing two additional qualifications. In a previous case the Supreme Court refused to consider a preference as defined by § 60 *a* to be limited by the second of these qualifications, and pointed out the just distinction between a preference which must be surrendered before claiming further payment from the trustee, and one which the trustee may recover although no such claim is made. *Pirie v. Chicago Title & Trust Co.*, 21 Sup. Ct. Rep. 906; see 15 HARV. L. REV. 232. The same reasoning applies to the principal case, which is further supported by one previous decision. *In re Jones*, 110 Fed. Rep. 736. Legislation should supply the remedy if any is needed.

**CONFLICT OF LAWS — DAMAGES FOR BREACH OF CONTRACT.** — A contract for the sale of Massachusetts land was made in New York and was to be performed there. The seller, through no fault of his, was unable to convey a good title. Under these circumstances, the law of New York and the law of Massachusetts provide different rules of damages. The buyer brought suit in Massachusetts. *Held*, that the law of New York governs the assessment of damages. *Atwood v. Walker*, 61 N. E. Rep. 58 (Mass.).

It has been held in Massachusetts that damages by way of interest for delay after demand pertain to the remedy, and are to be governed by the law of the forum. *Ayer v. Tilden*, 15 Gray (Mass.) 178. This is opposed to the great weight of authority.



*Peck v. Mayo*, 14 Vt. 33; *Gibbs v. Fremont*, 9 Ex. 25. In the principal case, however, the Massachusetts court adopts the rule that the law of the place of performance applies to all cases of damages, other than those for delay in payment. The reason for distinguishing the interest cases is not made very clear, but otherwise the decision seems correct on principle. A party to a contract gets originally the right to have the contract performed, See 8 HARV. L. REV. 27. When the contract is broken the law in force at the place of performance converts the right to performance into a right of action. See MINOR, CONFL. LAWS, § 205. Compensatory damages, being a mere measure of the right of action, ought therefore to be governed by the law of the place of performance. This view is supported by a *dictum* in *Northern Pacific R. R. Co. v. Babcock*, 154 U. S. 190. With this exception no authority, other than the interest cases, has been found.

CONFLICT OF LAWS—JURISDICTION IN TORT—DEATH CAUSED BY WRONGFUL ACT.—An English vessel, by reason of the negligence of those in charge of her, ran into a Norwegian vessel on the high seas, and as a result a Norwegian seaman was drowned. His personal representative sued the owners of the English vessel in England. *Held*, that the plaintiff has a right of action under The Fatal Accidents Acts. *Davidsson v. Hill*, [1901] 2 K. B. 606.

The decision goes on the ground that a foreigner as well as a British subject is entitled to the benefit of statutory remedies. The case is treated precisely as if the cause had arisen in England, and the question of the *lex loci delicti* is not adverted to. The result reached, however, is correct according to the curious doctrine of the English courts. Recovery is allowed in England for any act, whether or not actionable where committed, which is actionable by English law, unless it has an affirmative legal justification by the law of the place where it was committed. *Machado v. Fontes*, [1897] 2 Q. B. 231. In the principal case, the court would be warranted in assuming that the act complained of, even if committed in Norwegian jurisdiction, had no affirmative legal justification. Cf. *McDonald v. Mallory*, 77 N. Y. 546. The English rule is not followed in the United States. Here the *lex loci delicti* is held to govern the right to sue. *Le Forest v. Tolman*, 117 Mass. 109; *Northern Pacific R. R. Co. v. Babcock*, 154 U. S. 190. The fatal force having been applied on a Norwegian vessel on the high seas, the law of Norway would govern. *United States v. Davis*, 2 Sumn. (U. S. Circ. Ct.) 432; *McDonald v. Mallory*, *supra*. Consequently the plaintiff would fail unless the law of Norway allows personal representatives to sue for death by wrongful act.

CONSTITUTIONAL LAW—CONTROL OF CONGRESS OVER THE INDIANS—EMINENT DOMAIN.—*Held*, that an Act appropriating Indian lands for town-site purposes and providing for compensation to the Indians, is within the power of Congress. *Tuttle v. Moore*, 64 S. W. Rep. 585 (I. T., C. A.). See NOTES, p. 399.

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—DEBT LIMIT EXCEEDED FOR NECESSARY PURPOSE.—A county seat having been destroyed by fire, the county, in order to rebuild the court house, issued warrants beyond the debt limit set by the constitution. *Held*, that the warrants are legal obligations because issued for something absolutely necessary. *Farquharson v. Yeargin*, 64 Pac. Rep. 717 (Wash.).

It has been held that in order to pay expenses which the constitution requires, warrants in excess of the constitutional debt limit may be issued. *Rauch v. Chapman*, 16 Wash. 568. This decision may perhaps be supported on the ground that the constitutional restriction ought not to be so construed as to make the constitutional mandate in any instance nugatory. In some jurisdictions obligations the assumption of which is compelled by statute are held not within the restriction. *Grant County v. Lake County*, 19 Or. 453. On the other hand, the opposite view is sometimes taken. *Barnard v. Knox County*, 105 Mo. 382; *Lake County v. Rollins*, 130 U. S. 662. The principal case is believed to be the first in which necessity other than that imposed by the constitution or by statute has been held to remove a debt from the constitutional restriction. If the decision means that the county authorities may judge of the necessity, the bars against extravagance which the people have placed in the constitution, are thrown down. If the court is to judge of the necessity, a check upon the counties is retained, but by compelling the court to decide a question of the sort usually belonging to the executive department to determine. There are decisions against the loose construction adopted in the principal case. *Prince v. Quincy*, 105 Ill. 138.

**CONTRACTS — ILLEGALITY — RESTRAINT OF COMPETITION.** — The plaintiff, being on the point of entering into a contract with a city to furnish paving material for a street, the defendant agreed to pay him a sum proportionate to the amount of material used in paving the street, provided the plaintiff would not enter into the said contract, nor sell any crushed rock within the city during the remainder of the year. *Held*, that such a contract is not void as against public policy. *Marshalltown Stone Co. v. Des Moines Mfg. Co.*, 87 N. W. Rep. 496 (Ia.).

The court seems to have based its decision entirely on the general rule holding illegal only those agreements in restraint of trade which are unlimited in time and space. This rule, however, has been applied almost entirely to contracts where one party agrees not to enter into a certain business in competition with the other. *Diamond Match Co. v. Roeber*, 106 N. Y. 473. In such cases the courts desire, while protecting the public, to give as wide a freedom of contract to the parties as possible. See *Roussillon v. Roussillon*, 14 Ch. D. 351. On the other hand it has been almost invariably held that agreements to stifle competition in bids for public work are void as against public policy. *Hunter v. Pfeiffer*, 108 Ind. 197; *Gibbs v. Smith*, 115 Mass. 592. At least one sufficient reason for these decisions is that the public is directly interested in the work which is the subject of the bidding, and therefore in having the competition unrestricted. This reason would apply equally in the principal case to the agreement of the plaintiff not to enter into the contract with the city, for, although there does not appear to have been an advertisement for bids as in the cases cited, the result to the public is substantially the same. No authority exactly in point has been found. The view proposed makes the consideration on which the plaintiff relies illegal in part. This is sufficient to bar his suit. *Bishop v. Palmer*, 146 Mass. 469.

**CORPORATIONS — DISSOLUTION — SURVIVAL OF ACTION.** — An action against a corporation for libel was abated by the dissolution of the defendant through the expiration of its charter. By statute, the former directors held the corporation property after dissolution in trust for creditors and stockholders. *Held*, that the suit may be revived against the trustees. *Shayne v. Evening Post Pub. Co.*, 168 N. Y. 70.

The statute would seem to be merely declaratory and was not relied upon by the court. The word creditors, however, is broad enough to cover a claimant in tort. *Barling v. Bishopp*, 29 Beav. 417; see *Marstaller v. Mills*, 143 N. Y. 398, 401. No case in point unaffected by special statutes has been found, but one text-book at least may be cited in favor of the decision. ANG. & A., CORP., § 779 a. It was contended that the rule, *actio personalis moritur cum persona*, governed the case. The dissolution of a corporation, however, has not in all respects been treated like the death of a natural person. The latter event, at common law, extinguishes some actions, but others survive against the personal representative. The former extinguishes all actions at law, but in equity the corporation property after dissolution is a trust fund for creditors and stockholders. *Vose v. Grant*, 15 Mass. 505, 522; *Wood v. Dummer*, 3 Mason (U. S. Circ. Ct.) 308. In the principal case, therefore, the court is not restricting the operation of an ancient rule of law, but simply refusing to limit an equitable doctrine by applying an inequitable legal analogy. As the requirements of justice are clear, the decision ought to be accepted.

**CORPORATIONS — PREFERENCE OF DIRECTORS.** — An insolvent corporation conveyed all its property in trust to pay debts of the corporation due to the directors and debts for which they were sureties. *Held*, that other creditors may set aside the trust deed on the ground that a majority of the directors were preferred. *Nappanee Canning Co. v. Reid*, 60 N. E. Rep. 1068 (Ind.).

It has been held that the assets of an insolvent corporation which has not been dissolved, form a trust fund to be ratably distributed among its creditors. *Rouse v. Merchants' Nat. Bank*, 46 Oh. St. 493. That doctrine seems now, however, to be discredited, and generally a corporation, like an individual, may prefer certain of its creditors. MOR., CORP., §§ 802, 803; *Hollins v. Brierfield, etc., Co.*, 150 U. S. 371; 11 HARV. L. REV. 550. In jurisdictions where this is allowed, no sufficient reason appears why a corporation should not be able to prefer its directors. but a few such jurisdictions hold all preferences to directors illegal. *Beach v. Miller*, 130 Ill. 162; *contra*, *Levering v. Bimel*, 146 Ind. 545. There is also some authority for distinguishing as illegal a preference to a majority of the directors, on the ground that such a preference must have been secured partly at least by the votes of the preferred directors. *Love Mfg. Co. v. Queen City Mfg. Co.*, 74 Miss. 290; *contra*, *Worthen v. Griffith*, 59 Ark. 562. The objection to allowing directors to profit by their own

votes seems to be that they are thus tempted to manage the corporation business for their own personal advantage. But this objection, though making the acts in question voidable by the stockholders acting through the corporation, should not be available to persons toward whom the directors occupy no fiduciary relation. See *Sanford, etc., Co. v. Howe*, 157 U. S. 312. A creditor may generally proceed in bankruptcy, and other remedy should be left to the legislature.

**DAMAGES — BREACH OF CONTRACT — PAYMENTS DUE IN FUTURE.** — By contract between a material-man and a contractor, eighty per cent. of the contract price of materials to be furnished by the former during each month, was payable on the first of the following month, and the remaining twenty per cent. on completion of the building. The contractor made default in the eighty per cent. payments, and in consequence the material-man refused to proceed with the contract and sued immediately. *Held*, that the twenty per cent. became due at once and can be recovered with the eighty per cent. before completion of the building. *Mullin v. United States*, 109 Fed. Rep. 817 (C. C. A., Second Circ.). See NOTES, p. 397.

**EQUITY — INJUNCTION AGAINST ENFORCEMENT OF ERRONEOUS DECREE.** — A contractor sued in a federal court to enforce a statutory lien on a railroad. He properly prayed a sale of all the company's property and franchises; but the court, misconstruing the statute which created the lien, rendered a final decree against the company for a sale of a part of the road-bed. To restrain this sale, the company sought an injunction against the contractor in another federal court. *Held*, that the injunction should issue. *Connor v. Tennessee Cent. R. R. Co.*, 109 Fed. Rep. 931 (C. C. A., Sixth Circ.).

The court presumably does not hold the original decree void. The validity of a decree may be collaterally attacked only for lack of jurisdiction, and if the remedy asked was proper it is not a jurisdictional defect that the remedy given was unjustified. *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158. Contrary holdings on this last point are confined almost entirely to *habeas corpus* cases, and a decision of the court which decided the principal case minimizes their force there. *De Bara v. United States*, 99 Fed. Rep. 942; see 9 HARV. L. REV. 287. The reasoning in the principal case is that, since the decree alone cannot and the statute does not remove the common law disability of the railroad company to convey its property separate from its franchises, a deed according to the decree will be void; and that equity should excuse the plaintiff from clouding its own title. On authority, however, equitable relief against the result of proceedings by the same parties in another court must have some further reason than irregularity or error in those proceedings; failing that, the former adjudication binds. *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Marine Ins. Co. v. Hodgson*, 7 Cranch 332. That the decree deals with property specially exempt does not justify disregarding this rule of administration. *Crowley v. Davis*, 37 Cal. 268. From this it follows that the present plaintiff should be able to escape obedience to the original decree only by appeal.

**EQUITY — TRUSTS — ASSIGNMENT OF WHOLE AMOUNT OF PARTIALLY PAID CLAIM.** — The plaintiff assigned to the defendant a claim against an insolvent, upon which, before the assignment and unknown to both parties, payments had been made by the insolvent's assignee to the plaintiff's attorney. The defendant, learning these facts, induced the attorney to pay to him the amount so received. The plaintiff brought an action for reformation of the contract of assignment and for other equitable relief. *Held*, that he is not entitled to relief. *Curtis v. Albee*, 167 N. Y. 360. See NOTES, p. 401.

**EVIDENCE — HEARSAY — COMPLAINTS OF RAVISHED CHILD TOO YOUNG TO TESTIFY.** — The accused was indicted for rape upon a child too young to be a witness. *Held*, that testimony that complaints were made by the child shortly after the occurrence is admissible. *People v. Figueroa*, 66 Pac. Rep. 202 (Cal., Sup. Ct.).

When the prosecutrix has testified to the alleged criminal act, evidence that she made complaint shortly after the commission of the crime is admissible. *Commonwealth v. Cleary*, 172 Mass. 175. The rule rests upon the reason long ago stated by Lord Hale that such evidence corroborates the testimony of the prosecutrix. 1 HALE, P. C., 632, 633. Accordingly cases are numerous holding such evidence inadmissible unless the prosecutrix has testified. *Hornbeck v. State*, 35 Oh. St. 277. In California, however, the law seems fixed in accordance with the principal case. *People v. Barney*,



114 Cal. 554. The strongest argument in favor of the evidence is the difficulty of proving the charge in such cases without it. But the probative value of statements by so young a child is speculative, especially when, as in the principal case, the particulars of the complaint are not admitted. The distinction thus drawn between the fact of complaint and the particulars, though commonly adopted, is always unsatisfactory, and might well have been rejected where there is apparently a disposition to lay down a new and rational rule. See 11 HARV. L. REV. 199. The decision illustrates a tendency of modern courts to admit matter believed to be probative, disregarding the fixed rules of evidence.

INTERNATIONAL LAW — APPLICATION OF PENAL LEGISLATION TO FOREIGN MERCHANT VESSELS. — Section 24 of the Act of December 21, 1898 (30 U. S. Stat. 763) forbids the payment of a seaman's wages in advance to himself or any other person, and subjects the vessel on which the seaman has shipped to libel by the seaman for the amount of wages paid in violation of this statute. It is further provided that "this section shall apply as well to foreign vessels as to vessels of the United States." A seaman shipped on a British vessel in an American port, and part of his first month's wages was paid in advance to a shipping agency. He subsequently libelled the vessel. *Held*, that the application of this statute to foreign merchant vessels is within the power of the United States. *The Kestor*, 110 Fed. Rep. 432 (Dist. Ct., Del.); *contra*, *The Eudora*, 110 Fed. Rep. 430 (Dist. Ct., E. D. Pa.).

The jurisdiction of a state within its territorial waters is, potentially, absolute. See *Schooner Exchange v. McFaddon*, 7 Cranch 116. Exemption from jurisdiction exists only for convenience, and by virtue of the consent of the state; and it is allowed by recognized international usage only in the cases of foreign war vessels, and vessels belonging to a sovereign. *Schooner Exchange v. McFaddon*, *supra*; *The Parlement Belge*, 5 P. D. 197. Merchant vessels are regularly, in the absence of treaty stipulations, subject to local laws while in port. *United States v. Dieckelman*, 92 U. S. 520. In some countries, a certain amount of immunity from local jurisdiction, as to things done on board, is granted to merchant vessels by the so-called "French rule." *The Newton and The Sally*, ORTOLAN, 1 DIPLOMATIE DE LA MER, 450; *The Tempest*, *ib.*, 455. The rule has not yet been generally adopted. See HALL, INTERNAT. LAW, § 57. It has been recognized by the United States under a treaty with Belgium. See *Wildenhus's Case*, 120 U. S. 1. The acts complained of in the principal case were not done aboard but ashore; there was no treaty calling for the application of the "French rule;" and it is further submitted that in any case, whatever immunity merchant vessels have enjoyed may be withdrawn by a state in the exercise of its sovereignty. By the statute in the principal case, Congress clearly showed an intention to exercise this potential authority. The decision in *The Eudora*, *supra*, is based on the fiction of extra-territoriality, which is discussed below.

INTERNATIONAL LAW — THE FICTION OF EXTRA-TERRITORIALITY. — *Held*, that an act of Congress cannot apply to a foreign merchant vessel in American waters, since such vessel is a part of the territory of the country to which she belongs. *The Eudora*, 110 Fed. Rep. 430 (Dist. Ct., E. D. Pa.).

The jurisdiction of a country was formerly regarded as co-extensive with its territory. Accordingly, to explain jurisdiction over vessels on the high seas it was said that they were part of their country's territory. The fiction was extended to vessels in the territorial waters of a foreign state whenever the latter did not choose to exercise its jurisdiction. See HALL, INTERNAT. LAW, § 48. It seems never to have been used, as in the principal case, for the purpose of denying the right of a state to exercise jurisdiction within its territorial waters. The fiction fails to explain the situation logically when a vessel sinks, or when a vessel belonging to a state whose boundaries are fixed by statute, sails beyond the boundaries so fixed. See DANA'S WHEAT., INTERNAT. LAW, 303, 304; see also *McDonald v. Mallory*, 77 N. Y. 546. The fiction is moreover unnecessary. Some law must govern a vessel at all times, and since there is no territorial law on the high seas, the law of the flag is the law most rationally to be applied. The reason for applying it ceases when the vessel comes where some territorial law is in force. Under those circumstances it is only when the state waives its jurisdiction, as it usually does in cases of war vessels or vessels of a sovereign, and may do in case of merchant vessels, that the law of the flag will govern. See *The Kestor*, 110 Fed. Rep. 432, and the discussion of that case above.

**MORTGAGES — ASSIGNEE ASSUMING MORTGAGE DEBT — EXTENSION OF TIME BY MORTGAGEE.** — A mortgagee contracted with the assignee of the mortgagor to extend the time on the mortgage. After the extended time had elapsed, the mortgagee sued the mortgagor on his original covenant. It appeared that the mortgagor was not actually injured by the giving of time. *Held*, that his liability is not thereby discharged. *Forster v. Ivey*, 21 Can. L. T. 550 (Can., Sup. Ct.). See NOTES, p. 398.

**MORTGAGES — ASSIGNEE ASSUMING MORTGAGE DEBT — LIABILITY IN EQUITY.** — A mortgagor assigned his interest to one who assumed the mortgage debt. Subsequently the mortgagee foreclosed, and, the land being insufficient to satisfy the debt, obtained judgment for the balance against the mortgagor. The latter sought in equity to enforce his assignee's promise to pay. *Held*, that he has no remedy in equity. *Thompson v. Lodge*, 58 Legal Intel. 428 (Phila. Co.). See NOTES, p. 398.

**MUNICIPAL CORPORATIONS — ASSESSMENTS FOR LOCAL IMPROVEMENTS — INFERIOR WORK AS A DEFENCE.** — A contractor, in carrying out a street improvement, failed to conform to the specifications of the ordinance authorizing the work, and the improvement was of less value than if the specifications had been followed. *Held*, that these facts are not available as a defence to one whose land was assessed for the improvement. *People v. Whidden*, 61 N. E. Rep. 133 (Ill.).

When land is assessed for local improvements, all conditions precedent to legally entering upon the work, such as filing of plans, publishing notice, and kindred matters, must have been strictly complied with. *Harper's Appeal*, 109 Pa. St. 9. Moreover, where the contractor was the real plaintiff, suing on tax-certificates, the defence urged in the principal case has been allowed. *Erie City v. Butler*, 120 Pa. St. 374; *contra*, *Fass v. Seehawer*, 60 Wis. 525. And in any case if the completed work is a materially different improvement from that for which the assessment was authorized, the levy is void. *Pells v. People*, 159 Ill. 580. But when this is not the case and the suit, as usually happens, is between the city and the tax-payer, objections to the quality of the work by persons assessed are not generally entertained after it has been completed and accepted. *Ricketts v. Hyde Park*, 85 Ill. 110; *Lowell v. Hadley*, 8 Met. (Mass.) 180. In such cases, if no fraud appears, the tax-payer cannot question the discretion of the municipal officials. See *State v. Jersey City*, 29 N. J. Law 441, 449. Before completion and acceptance, persons interested may compel adherence to specifications by injunction or mandamus. *People v. Green*, 158 Ill. 594, 597. The decision in the principal case is necessary to avoid trivial pleas which would seriously interfere with the collection of assessments.

**PROCEDURE — TRIAL OF FELONY — PRESENCE OF ACCUSED.** — On a trial for felony, before the entrance of the prisoner into court, a witness was asked her name and that of her husband; the absence of the prisoner was then noticed and he was brought into court and the same questions were asked and the same answers given. *Held*, that the taking of such testimony in the absence of the accused constituted reversible error. *State v. Sheppard*, 39 S. E. Rep. 676 (W. Va.).

The rule that in a trial for felony the accused must be present at every stage of the proceedings, is one of the fundamental principles of the common law and has frequently been reinforced in this country by statutory enactments and constitutional provisions. *French v. State*, 85 Wis. 400; *Maurer v. People*, 43 N. Y. 1. Though the reasons for the rule are far less strong in modern times, it is still strictly enforced. See 11 HARV. L. REV. 409. But courts ought to apply the rule rationally, and not, for technical but immaterial violations, subject the state to the expense and the delay of justice caused by a re-trial. *People v. Bragle*, 88 N. Y. 585. If there is a particle of doubt as to whether the error might possibly prejudice the accused, reversal is justifiable; but in the principal case no harm to the accused could result, and the blind adherence to the letter of the rule necessarily tends to injure the standing of the courts and the law in popular estimation.

**PROPERTY — AUXILIARY ADMINISTRATION — PAYMENT TO FOREIGN ADMINISTRATOR.** — A savings bank in New York paid over the sum standing to the credit of a deceased non-resident depositor, to the domiciliary administrator. An auxiliary administrator previously appointed in New York, sued the bank for the amount of the deposit. *Held*, that the payment to the foreign administrator is no bar to the action. *Maas v. German Savings Bank, etc.*, 36 N. Y. Misc. 154 (Sup. Ct., App. Term).

Letters of administration have no extra-territorial effect, and confer upon the per-

son appointed no rights as administrator in any foreign court, except where such rights are given him by statute of the foreign state. *Goodwin v. Jones*, 3 Mass. 514. He may, however, under certain circumstances, accept voluntary payments within a foreign jurisdiction, and give a valid discharge. *Wilkins v. Ellett*, 9 Wall. 740. This privilege is commonly granted whenever no auxiliary administrator has been appointed. But being extended merely by comity, it might well be denied whenever the interests of resident creditors are at stake. See *Parsons v. Lyman*, 20 N. Y. 103. Upon application of any such creditors an auxiliary administrator will be appointed, who then has exclusive authority over all assets within the jurisdiction, superseding that of the domiciliary administrator. *Reynolds v. McMullen*, 55 Mich. 568. He may even demand from the latter all evidences of these assets. *McCully v. Cooper*, 114 Cal. 258. Any subsequent payment to the foreign administrator upon such debts would logically be no bar to an action by the auxiliary administrator, and so it was decided in the only cases directly in point which have been found. *Walker v. Walker*, 55 Ill. App. 118; *Stone v. Scripture*, 4 Lans. (N. Y.) 186.

PROPERTY — DEEDS OF INSANE PERSONS. — *Held*, that the deed of an insane person is absolutely void. *Daugherty v. Powe*, 30 So. Rep. 524 (Ala.); *Wilkinson v. Wilkinson*, 30 So. Rep. 578 (Ala.).

The prevailing rule is that deeds of insane persons are merely voidable. *Allis v. Billings*, 6 Met. (Mass.) 415; *Eaton v. Eaton*, 37 N. J. Law 108; *Riggan v. Green*, 80 N. C. 236. The Alabama decisions above, however, are well supported by authority. *Thompson v. Leach*, 3 Mod. 301; *Matter of Desilver*, 5 Rawle (Pa.) 111; *Van Deusen v. Sweet*, 51 N. Y. 378. The conflict is doubtless largely due to the confusion in the use of the words void and voidable. See *State v. Richmond*, 26 N. H. 232, 237. It has been maintained that a lunatic is incapable of the mental act requisite for a contract or a deed. *Dexter v. Hall*, 15 Wall. 9, 25. The modern tendency, however, makes the case of an insane person similar to that of an infant. The mental weakness of the one, like the immaturity of the other, makes it easy for unscrupulous persons to gain an unfair advantage. The law as a matter of policy protects the infant by allowing him to avoid his contracts at his election without denying him the benefit of such as are to his advantage, and insane persons would seem entitled to the same treatment. Of course where adjudication statutes vest the lunatic's property in a committee, the deed of one adjudged insane is a nullity. *Griswold v. Butler*, 3 Conn. 227, 231. Otherwise justice is best served by making the deed merely voidable.

PROPERTY — DETERMINATION OF CLASS — DEVISE OF REMAINDER TO SURVIVING CHILDREN. — A testator devised land to his daughter for life, "and at the time of her decease to her surviving children equally share and share alike" in fee. *Held*, that a remainder vested at the testator's death in the daughter's children then living. *In re Twaddell*, 110 Fed. Rep. 145 (Dist. Ct., Del.).

The land being in Pennsylvania, the court follows a Pennsylvania decision that the word "surviving" in this connection means surviving the testator, not the life-tenant. *Ross v. Drake*, 37 Pa. St. 373. This construction is supported by one English case. *Doe v. Prigg*, 8 B. & C. 231. The cases, however, on which that decision was founded have since been overruled, and the decision itself is discredited accordingly by numerous judicial expressions. See *Neathway v. Reed*, 3 De G. M. & G. 18; *In re Gregson*, 2 De G. J. & S. 428. As to a devise of the precise form set out above, no American decision found adopts the Pennsylvania construction and several reject it. *Slack v. Bird*, 23 N. J. Eq. 238; *Cheatham v. Gower*, 94 Va. 383. One case applied that construction to a remainder devised to the testator's surviving children. *Grimmer v. Friederich*, 164 Ill. 245. Contrary decisions are numerous. *Coveny v. McLaughlin*, 148 Mass. 576. In these cases if the word "surviving" is referred to the testator's death it is superfluous. They are in that respect distinguishable from the principal case, where "surviving" might have been inserted to exclude children born after the testator's death. As a matter of good sense, however, the testator's intention is, it is submitted, more correctly read by the authorities which oppose *Ross v. Drake*, *supra*.

PROPERTY — SALE BY ONE ENTRUSTED WITH POSSESSION — CERTIFICATE OF INDEBTEDNESS INDORSED IN BLANK — BREAKING BULK. — The plaintiff left with brokers for safe keeping an envelope containing certificates of indebtedness of a city, indorsed in blank. The brokers sold the certificates to an innocent purchaser. *Held*, that the purchaser did not get title. *Scollans v. Rollins*, 60 N. E. Rep. 983 (Mass.). See NOTES, p. 403.

**PROPERTY — VENDOR'S LIEN UPON REAL ESTATE — WAIVER.** — The defendant, acting as his wife's agent, obtained from the plaintiff a conveyance of real estate to the wife's appointees, giving as part of the consideration his own promissory note with sureties. *Held*, that the vendor's lien is thereby waived. *Shrimsher v. Newton*, 64 S. W. Rep. 534 (I. T.).

About half of the states have accepted the English doctrine allowing an equitable vendor's lien on realty. See 2 JONES, LIENS, 2nd ed., § 1063. This lien is commonly said to be based on a natural equity, and to exist by implication of law unless a contrary intention is manifested by the parties. *Mackreth v. Symmons*, 15 Ves. 329. But what will suffice to show a contrary intention is much disputed. See 3 POM., EQ. JUR., § 1251. American courts generally infer from the acceptance of the personal obligation of a third person either a conclusive or a presumptive waiver of the lien. *Boynton v. Champlin*, 42 Ill. 57; see *Hunt v. Marsh*, 80 Mo. 396; *contra*, *Grant v. Mills*, 2 Ves. & B. 306. It is doubtful whether such an inference is well founded. See *Kauffelt v. Bower*, 7 S. & R. 64, 77. But the wisdom of recognizing such liens at all is questionable, for the policy of our law as illustrated by the registry system is opposed to secret and uncertain encumbrances. See *Ahrend v. Odiorne*, 118 Mass. 261. The restriction of the doctrine, therefore, is not to be regretted. Where the third person is really the purchaser, although the conveyance runs to his wife, the acceptance of his note is no waiver. *Hunt v. Marsh*, *supra*; *contra*, *Andrus v. Coleman*, 82 Ill. 26. The principal case, however, in which the defendant acted solely as agent, falls within the general rule.

**SALES — BAILMENT WITH OPTION TO BUY — OWNER'S REMEDY UPON TOTAL REPUDIATION.** — In a written agreement the plaintiff promised to the defendant the use of a certain piano for the next nine months, for which the defendant promised to pay \$25 cash and \$250 in specified unequal instalments; the plaintiff further agreeing to give the defendant, for three months after the period mentioned, the option to buy for \$25 more. The writing referred to the agreement as a lease, and stated the value of the piano as \$300. The defendant refused the piano when possession was tendered, and was sued for the first \$25 before the date set for the second payment. *Held*, that the plaintiff may recover the first payment in full. *Gray v. Booth*, 64 N. Y. App. Div. 231.

If the transaction was, as the court treats it, the usual conditional sale, in which the seller retains title merely for security, the plaintiff may properly recover the full price in instalments, exactly as if he had given title and taken it back by way of mortgage. *Marvin Safe Co. v. Emanuel*, 14 N. Y. St. Rep. 681. If a sale in substance, it will be so treated though in form a lease. *Murch v. Wright*, 46 Ill. 487. The objection, however, is conclusive that since there was no promise to pay the price, there was no sale. *McCall v. Powell*, 64 Ala. 254. Perhaps the case was thought analogous to those where one who contracts to buy and later refuses to take title is liable for the full price. This rule practically gives specific performance at law; but it was early recognized in New York and is there freely applied. *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Hayden v. Demets*, 53 N. Y. 426. In cases purely of sale, it forces on the defendant what he agreed to buy, namely, the title to the chattel. This effect, necessary to justify the rule, is impossible where, as in the principal case, the subject of the defendant's purchase is the actual use of a chattel. Therefore neither of the rules discussed, apparently the only ones available for the purpose, suffices to support the decision.

**STATUTE OF LIMITATIONS — PART PAYMENT BY ADMINISTRATOR.** — A payment was made by an administrator upon a debt owed by his intestate, but barred by the Statute of Limitations. There was no express promise by the administrator to pay the balance. *Held*, that this is sufficient to take the debt out of the statute. *Slattery v. Doyle*, 61 N. E. Rep. 264 (Mass.).

In some jurisdictions an executor or administrator has no power to affect the operation of the statute. *Henderson v. Ilsley*, 19 Miss. 9. Massachusetts and a few other states give to the acts of an executor the same effect as if done by a debtor. *Foster v. Starkey*, 12 Cush. (Mass.) 324; *Shreve v. Joyce*, 36 N. J. Law 44. Between these two extremes there are several intermediate views, involving numerous distinctions. See *Patterson v. Cobb*, 4 Fla. 481; *Ray v. Strickland*, 89 Ga. 840; *Woods v. Irwin*, 141 Pa. St. 278. In England and some American states where an executor may control somewhat the effect of the statute, an express promise is required; and acknowledgments by an executor that would be sufficient if made by a debtor, are held insufficient



to bind the estate. *Oakes v. Mitchell*, 15 Me. 360; *Tullock v. Dunn*, Ry. & M. 416. In one case a part payment by an executor was held not to imply a promise to pay the balance, the question being treated as one of reasonable inference. *McLaren v. McMartin*, 36 N. Y. 88. In view of the Massachusetts doctrine, the decision in the principal case was to be expected, but it would seem the sounder policy to limit, if not to deny altogether, the power of the administrator to affect the operation of the statute. See 11 HARV. L. REV. 129.

**TORTS — CONSPIRACY — MONOPOLY.** — *Held*, that a declaration alleging that the defendants agreed to deal with each other and no one else, for the purpose, among others, of driving the plaintiff out of business, and that such result was accomplished, states a cause of action at common law. *Hawarden v. Youghioghenny Co.*, 87 N. W. Rep. 472 (Wis.). See NOTES, p. 402.

**TORTS — IMPUTED NEGLIGENCE — SUIT BY CHILD.** — A child of fifteen was injured by the negligence of the defendants, the father contributing to the accident by his carelessness. *Held*, that the negligence of the father is not imputable to the child so as to bar her recovery. *Ives v. Welden*, 87 N. W. Rep. 408 (Ia.).

In rejecting the doctrine of imputed negligence, the decision is in line with the modern tendency. *Wymore v. Mahaska County*, 78 Ia. 396; *Warren v. Manchester St. Ry. Co.*, 47 Atl. Rep. 735. But some jurisdictions, in cases of the child's death, have barred suits in which the negligent parent, if not the direct beneficiary, will eventually be the main gainer, on the ground that the real beneficiary should not be rewarded through his own fault. *Bamberger v. Citizens' St. Ry. Co.*, 95 Tenn. 18. This objection is of considerable weight even when the child survives, and suit is brought by him or for his benefit, since as a matter of practical experience, it is generally the parents who profit most by the recovery of the child. Still the child would usually derive some benefit from the damages recovered, and to this he should be entitled. The possibility of rewarding a negligent parent would be rather a weak ground on which to deny any remedy to the injured child. The decision in the principal case, then, seems to reach the right result.

**TORTS — STATUTORY NUISANCE — RIGHT TO ABATE.** — A statute declared any place where intoxicating liquors were sold a public nuisance, and provided that any citizen of the county in which such a nuisance existed might bring a suit in the name of the state to abate and enjoin the same. *Held*, that this statute does not justify a citizen in demolishing such a place. *State v. Stark*, 66 Pac. Rep. 243 (Kan.).

A private individual may abate a public nuisance only when it is also a private nuisance as to him, or incommodes him more than the rest of the public. See *Brown v. Perkins*, 12 Gray (Mass.) 89; WOOD, NUIS., 3rd ed., § 733. The statutory provision in the principal case does not make the offence a private nuisance as regards the citizen instituting the suit, so as to give him the right to abate, for it is expressly provided that the proceedings shall be in the name of the state. In Iowa, a similar statute allows the action to be brought in the citizen's name, and in Massachusetts it may be brought in the form of a petition by ten legal voters. In all these cases where private individuals may sue in their own names to enjoin what is solely a public nuisance, they must be regarded as special state's attorneys *quoad hoc*, mere public agencies to set the law in motion. See *Carleton v. Rugg*, 149 Mass. 550, 554. The principal decision is in accord with the authorities. *Brown v. Perkins*, *supra*.

**TRUSTS — BENEFICIARIES OF INSURANCE POLICY AS TRUSTEES.** — A guardian insured his life in the name of his wards, for the declared purpose of protecting his wards and his bondsmen from any loss to the estate of the wards. The guardian died, having squandered the estate. The new guardians collected the insurance, and then sued the sureties on the bond. The defendants contended that the policy was held in trust primarily for them, and that the fund collected should be applied to discharge their liabilities. *Held*, that there was no such trust, and that the defendants are liable. *Herring v. Sutton*, 39 S. E. Rep. 772 (N. C.).

There is much authority supporting the statement of the court that the wards took a vested property right in the policy, so that the policy and the money due under it belonged at law to them. *Central Bank, etc., v. Hume*, 128 U. S. 195. But this right was given them by the guardian, and the reason why he could not impose a trust upon it is not very evident. It has been held that a beneficiary of a life policy may be

trustee of it to the amount it exceeds his interest in the life of the insured, so as to be able to recover the full sum from the insurer. *American, etc., Co. v. Robertshaw*, 26 Pa. St. 189. Moreover choses in action, whether equitable or legal, may be assigned in trust, and an assignment absolute on its face may be shown to have been subject to a trust. *Way's Trusts*, 2 De G. J. & S. 365; *Denton v. Peters*, L. R. 5 Q. B. 475. It is true that in the principal case the donor never took title to the subject of the gift. But, though no case exactly like this has been found, on principle there seems no reason why he should on this account be less able to declare a trust.

**TRUSTS — CONSTRUCTIVE TRUSTS — BUCKET SHOP TRANSACTIONS WITH TRUST FUNDS.** — A trustee misappropriated trust money and delivered it to the defendants, proprietors of a bucket shop, to be used in gambling transactions, which were illegal by statute. A certain amount was returned to the trustee as profits. The defendants had no notice of the trust. *Held*, that the *cestui que trust* may recover the whole amount delivered to the defendants, without deducting the sum returned to the trustee. *Bendinger v. Central, etc., Exchange*, 109 Fed. Rep. 926 (C. C. A., Seventh Circ.). See NOTES, p. 404.

**TRUSTS — PROCEEDS OF INSUFFICIENT SECURITY — PRINCIPAL AND INCOME.** — A testator devised property in trust to pay the income to A for life, and then in trust for B. The property included a mortgage which the trustee was obliged to foreclose. The proceeds of the foreclosure sale fell short of the amount of the principal, and there was also due a considerable sum as back interest. *Held*, that the amount realized is to be apportioned to principal and interest in the ratio of the amounts due from the mortgagee under those respective heads. *In re Alston*, [1901] 2 Ch. 584.

Only one similar case has been found treating the entire sum as principal. *In re Grabowski*, L. R. 6 Eq. 12. But at least three different rules of apportionment have been followed in England. One of these apportions as principal that sum which, put at interest for the period during which interest was unpaid, would, at the usual rate for trust estates, have amounted to the sum recovered. *Cox v. Cox*, L. R. 8 Eq. 343. Another rule adds the interest previously received to the amount realized on foreclosure, and apportions this total sum in the ratio of the original principal to the interest for the entire period, debiting the life tenant with the interest received. *In re Foster*, 45 Ch. D. 629. The principal case adopts the third rule, following *In re Moore*, 54 L. J. Ch. 432. Authority in the United States is divided between the first and third rules. *Roosevelt v. Roosevelt*, 5 Redf. (N. Y.) 264; *Hagan v. Platt*, 48 N. J. Eq. 206; see also *Kinmoth v. Brigham*, 5 Allen (Mass.) 270. The rule of the principal case seems based on the true nature of the transaction. The claim filed upon foreclosure included principal and interest, and the amount recovered should be divided proportionally to the amounts due under those heads.

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## BOOKS AND PERIODICALS.

**THE TEST OF CONSIDERATION.** — In the first edition of his work on Contracts, Sir Frederick Pollock contended that performance of an obligation due one party could never be regarded as consideration for a contract with another party, since in contemplation of law it constituted no detriment, but that a promise to perform an act already due another, since it created a new right, might be so regarded. POLL., CONT'S, 1st ed., 158, 159. As examples of this later class, he cited *Shadwell v. Shadwell*, 9 C. B. N. S. 158, and *Scotson v. Pegg*, 6 H. & N. 295. In later editions he receded from this position, and seemed to doubt the validity of both performance and promise. POLL., CONT'S, 6th ed., 175-177. In a recent article, consisting of passages intended for the forthcoming seventh edition of his book, he has clearly retaken his first position, and in addition has recognized *Shadwell v. Shadwell*, *supra*, and *Scotson v. Pegg*, *supra*, as cases of the performance of, as distinguished from the promise to perform, a preëxisting obligation. *Afterthoughts on Consideration*, by Sir Frederick Pollock. 17 L. Quart. Rev. 415 (Oct., 1901).

The discussion evoked by this subject, since it turns on the fundamental nature of consideration, has been widespread. It has been vigorously contended that any detriment in fact should constitute consideration, and that such is here found, both in the performance and in the promise to perform. 12 HARV. L. REV. 515, *et seq.* Sir Frederick Pollock rejects this view with slight argument on the ground that detriment in contemplation of law, as distinguished from detriment in fact, has always been regarded as the test of consideration. He contends that as the cases here under discussion are extremely infrequent, the settled principles of contracts should be rigidly applied to them. It must be admitted that detriment in contemplation of law has been the phrase generally used by the courts, and yet, in endeavoring to do justice, they have often gone far beyond this test in their decisions. *Abbott v. Doane*, 163 Mass. 433. To the results we should look for the law, rather than to phrases which we have inherited from the past. Again, while cases involving the point here under discussion have been infrequent, cases where the previously existing obligation ran between the same parties who attempted to make the new contract have been frequent, and as the two classes of cases are so analogous, the decisions in one class must have a vital practical influence on the decisions in the other. In consequence this discussion ought not to be purely academic. Furthermore we should remember that the doctrine of consideration, after centuries of development and uncertainty, has only recently begun to assume rigid limitations. Under these circumstances there seems no sufficient reason for refusing to satisfy a business sense of justice by recognizing detriment in fact as the test of consideration.

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VESTED INTEREST OF A BENEFICIARY UNDER A POLICY OF LIFE INSURANCE. — The nature and the extent of the rights of the beneficiary under a policy of insurance are problems which have given rise to much conflict of authority. In cases where the beneficiary takes out the policy and pays the premiums, or where the insured is under a legal obligation to the beneficiary to procure and to maintain the policy, it is very properly held that the insured cannot by any act destroy the interest of the beneficiary. But courts almost universally go further, and hold that in all cases, unless express provision to the contrary is made, whether the above conditions are present or not, the beneficiary has the same right. *Central Bank v. Hume*, 128 U. S. 195; but see, *contra*, *Clark v. Durand*, 12 Wis. 223. The conflict of authority as to the extent of the right is so general that it seems impossible to bring the decisions into harmony with any legal principle. A recent writer, however, has undertaken to define the so-called "vested interest" of the beneficiary and to formulate the legal principle upon which it rests. *Vested Interest of Beneficiary under a Policy of Life Insurance*, by Alexander H. Robbins. 53 Central L. J. 184 (Sept. 6, 1901). The author finds the origin of the doctrine in the pecuniary interest which the beneficiary usually has in the life of the insured, and contends that the contract is "in the nature of an irrevocable trust." He further points out that the word "vested" means only that the beneficiary has an absolute, irrevocable right to the proceeds of the policy upon the happening of all the contingencies and the fulfilment of all the conditions. Important results follow from this limitation. The beneficiary's right is thus made contingent, and the sole present right is to prevent the insured from impairing the future right to take the proceeds.

Mr. Robbins's contention that the doctrine reaches just results and works out the intention of the parties is entirely warranted. But the principles by means of which he arrives at his conclusions seem questionable. The language of trusts, frequently employed by courts and by writers, seems to have no application. The insured never had any intention of making himself a trustee; on the other hand, the obligor cannot be a trustee, since there is in his hands no *res* to be kept apart for the benefit of the *cestui*.

The theory of contracts that the sole beneficiary may sue directly in his own name seems to offer a fair solution. If that general principle be once accepted,

it follows that immediately upon the issuing of the policy the beneficiary has, irrespective of the intentions of the parties, a vested chose in action, which the insured cannot legally destroy by revocation, surrender, assignment, or attempted change of beneficiary. The promise, however, of the insurer is not to pay absolutely to the beneficiary. It is in reality to pay the beneficiary if living at the death of the insured, and, if not, then to pay the insured or any person he may designate. If these conditions are not expressly stated yet it is submitted that according to the clear intention of the parties this is the fair meaning of the words. Whether the desirable results reached by Mr. Robbins may be attained on sound principle at all is open to doubt, but it is submitted that the doctrines of contract offer the fairest ground upon which to base them.

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IMPOSSIBILITY OF PERFORMING CONTRACTS AS A DEFENSE. — Impossibility of performance constituted no excuse in the early law for a breach of contract. To this rule three exceptions are now universally admitted. When performance is prevented by a change of law, by the death of one of the parties to a contract for personal service, or by the destruction of the subject matter of the contract, the breach is excused. See 15 HARV. L. REV. 63. These exceptions have been recognized on the ground that the parties impliedly agreed that such contingencies, and such only, should terminate the obligation. There are two objections to accepting this view as final. In the first place the parties generally have performance of the contract alone in mind, and therefore to say that performance was thus conditioned, is pure fiction. See 12 HARV. L. REV. 501. In the second place a number of American courts, rightly feeling that justice would thereby be furthered, have recognized as excuses contingencies which clearly are not covered by these exceptions. *Buffalo, etc., Co. v. Bellevue, etc., Co.*, 165 N. Y. 247; *Lovering v. Buck Mountain Co.*, 54 Pa. St. 291. Discontented with these old arbitrary exceptions, the courts have been groping for a more liberal rule.

Such a rule has been suggested in a recent article. *Impossibility of Performance as an Excuse for Breach of Contract*, by Frederick C. Woodward. 1 Colum. L. Rev. 529 (Dec., 1901). "If the contingency," Mr. Woodward says, "which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused." The proper inquiry is "Would the parties, had their attention been called to the contingency, have thought it unnecessary to provide for it in the contract? That is not altering or adding to the contract, but merely construing it as already made by the parties." This does not mean that performance is excused by force of an implied condition, which, as above stated, would be purely fictitious. The writer's meaning seems to be that as the plan of the parties may be presumed to have been to make a just contract, and as in justice certain contingencies ought to terminate the obligation, the words by which the parties bind themselves, although apparently absolute in form, may be construed to mean merely that the parties are bound, provided no such contingencies occur. The suggestion is certainly ingenious, but is in truth open to the same objection as the rule of implied conditions. Had the parties carefully considered all the possible contingencies, they would doubtless have agreed that such a contract was just, but their minds were concerned only with the making of a contract which they regarded as certain of performance, and they therefore used words which clearly imposed an absolute obligation, and which have always been regarded in that light at law. To construe them otherwise would be a clear violation of the meaning of words.

The truth of the matter is that the courts of law, recognizing the injustice of enforcing under all circumstances an absolute legal obligation, have interposed in certain cases what must be regarded as an equitable defense. Such a recognition of equitable principles at law is not unprecedented. Thus, a fraudulent vendee, who is in the position of a constructive trustee, has been held liable to



his vendor in trover. 1 HARV. L. REV. 4, note 2. If the courts will recognize this truth they will then be in a position to cast aside arbitrary fictions, and accept a rule working justice in all cases. A proper rule, it is suggested, is that impossibility should be recognized as a defense wherever it seems reasonable that, had the contingency which renders performance impossible been contemplated by the parties, they would have both agreed that its introduction into the contract, as a condition terminating the obligation, would be just.

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STATUTORY JURISDICTION OVER CRIMES. — Whatever doubt there may be as to the early common law, it is now well settled that the crime of murder is committed at the place where the fatal blow is struck, irrespective of the place of death. *U. S. v. Guiteau*, 1 Mackey (D. of Col.) 498. Numerous statutes have been enacted that if a blow is inflicted without the state and death ensues therefrom within the state, the offence may be punished where such death occurs. Under these statutes, trials resulting in convictions have occurred at the place of death. *Tyler v. People*, 8 Mich. 320; *Comm. v. Macloon*, 101 Mass. 1. These statutes have recently been assailed as exercising extra-territorial jurisdiction over crimes — attempts in one jurisdiction to punish a crime committed in another. *Responsibility for Crime in Cases where the Criminal Act is Committed in one Jurisdiction and takes Effect in Another*, by Merle I. St. John. 3 Brief 422 (Oct., 1901). The difficulty seems to arise from a misapprehension of the crime that is being punished. It is true that a state cannot inflict punishment when the criminal act has been committed beyond its jurisdiction. Yet whoever causes a prohibited event to happen within a state has clearly made himself amenable to the law of that jurisdiction, regardless of whether he has been physically present or not. *U. S. v. Davis*, 2 Sumn. (U. S. Circ. Ct.) 482; *Lindsey v. State*, 38 Oh. St. 507. Homicide consists of a physical act and a chain of consequences which finally culminate in death. In the crime of murder the common law selects from this chain the application of the fatal force as the criminal act. But the state may if it wills select any other consequence and enact that whoever causes that consequence to occur within its borders shall be guilty of a crime, and whether it calls that crime murder or by some other name is quite immaterial. It is not the application of the fatal force that is here punished but a consequence thereof happening in a state whose people are injured by and whose laws prohibit such an occurrence. The statutes in question, therefore, create an offense not known perhaps to the common law — the offense of causing death — and this peculiar crime only occurs when the victim dies. Thus two distinct crimes are here committed; one, the common-law crime of murder, punishable only in the jurisdiction where the blow is struck, the other, the statutory offense of causing death, punishable in the state where death occurs.

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STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW. By A. Inglis Clark, Judge of the Supreme Court of Tasmania. Melbourne: Charles F. Maxwell. 1901. pp. xvi, 446. 8vo.

This is a book which should interest all students of our own system of constitutional law; and we heartily commend it to them. It gives the text of the Act of the Imperial Parliament which has united under a Federal Constitution those six states which now compose the Commonwealth of Australia, since the first day of the twentieth century; and this is accompanied by an instructive treatise and commentary on its leading provisions. What the author has undertaken is more exactly indicated in the title of his work and in his own words when he says: "The time has not yet arrived for a compre-

hensive and elaborate commentary upon it; and all that will be attempted in this volume will be a consideration of some of its fundamental and more prominent features."

The Australian constitution enacted by the Imperial Parliament in July, 1900, was largely modelled on our Federal instrument. Some of the points of difference are full of instruction: the fact for instance that in Australia free trade among the States is expressly secured; that the Federal government is allowed, in terms, to provide for bounties on the production or export of goods, for bills of exchange and promissory notes, insurance and banking, other than State insurance and banking, trade-marks, trading and financial corporations, marriage and divorce, invalid and old-age pensions; and that the Supreme Federal Court has final appellate jurisdiction on questions of local as well as Federal law.

The author, formerly attorney-general of Tasmania, is a careful and learned writer, who cites freely the apposite decisions of our own Supreme Court with a remarkable general accuracy. Now and then there is a slight error or inadvertence, as when some of the earlier decisions in the second volume of Dallas are attributed to the Supreme Court. The decisions of that tribunal do not begin till page 399.

In discussing the clause which gives jurisdiction in Australia to the Federal Supreme Court in all cases "between a State and a resident of another State," (the instrument does not speak of "citizens"; that word occurs but once, and then only in reference to foreign powers), the effect of our eleventh amendment upon the like clause in our constitution seems not to be quite accurately conceived. That amendment did not purport to change our constitution. It merely construed it and overruled the decision of the Supreme Court in *Chisholm v. Georgia*. Therein it furnished an extremely interesting instance of the people acting in their ultimate *judicial* capacity. This matter is well expounded in *Hans v. Louisiana*, 134 U. S. 1. What, then, under these circumstances, it may well be asked, is the true meaning in Australia of the clause above quoted? Is it, as our author seems inclined to think, that which our Supreme Court put upon the like clause in our own constitution, in *Chisholm v. Georgia*? Or that which our *supremest* tribunal, the people of the United States, put upon the same clause in the eleventh amendment, acted upon as it was by the Supreme Court, in dismissing all other cases then on the docket, and approved (as an original question), as it has been by the Supreme Court in 1889, in *Hans v. Louisiana*, 134 U. S. 1? That is, indeed, a pretty question. There is another clause of the Australian constitution (s. 78) that seems to enable the Federal parliament to confer this jurisdiction on the courts. The excellent "Annotated Constitution of Australia," by Quick and Garrard, denies the doctrine of *Chisholm v. Georgia* in its application to the Australian document.

In saying that "President Jefferson on one occasion refused to obey a *mandamus* granted by the court to compel the admission of an applicant for a judicial office to which he had been appointed by the President's predecessor," the author misremembers *Marbury v. Madison*. No *mandamus* to a President has ever been issued, and no President has ever yet had occasion to discharge his undoubted duty of disregarding such a precept.

These things, however, are but trifling qualifications of an accuracy that is remarkable in the task of dealing with a branch of law and a set of cases so foreign to the ordinary studies of an English lawyer.

In considering the regulation of "trade and commerce with other countries and among the States," the writer takes the view that the power is exclusive. It is true, as we have said, that section 92 of the Australian instrument expressly provides for free trade among the States; and thus one point is settled there, which may still be debated among us; but that obscure bugaboo, the "Police Power," remains; and in view of that fact it is pathetic to see the confidence which the writer expresses that the judges in Australia are to be saved the distressing difficulties that have embarrassed our tribunals in coördinating State and Federal power in dealing with this subject.

The author is too respectful to some of our decisions, or rather to the exposition and reasoning of them; especially to that poor conceit, *when put as a*

*general proposition*, about the silence of Congress being equivalent to an Act of Congress. It is to be hoped that the Australian Court will consult the things that make for its peace in not trying to follow our court too closely into the hopeless mazes on this subject in which it is still struggling. Let the new tribunal, rather, at once recognize that it is mainly for the Federal legislature and not the courts to draw the line between what the States may and may not do in the dim region that connects the local power of legislation with the Federal power of regulating interstate and foreign commerce; and that in the main, so far as the Federal Courts are concerned, the States must be allowed to go on as before in regulating their own internal affairs. The true line there has been suggested in some opinions of Kent, and of Taney, Curtis, and Gray, — rather than in many of the best known and oftenest quoted decisions of the Supreme Court, which on some fundamental matters has still to find sure footing.

There are many interesting points about this great new instrument in Australia which one would like to touch on, but space and time fail. Let us refer only to a radical difference between the Australian constitution and ours, not overlooked by Judge Clark, namely, that we ground ours on the authority of our own people, while theirs, in a legal sense, rests ultimately on an Act of the Imperial Parliament. In both cases the power that made can unmake. In the case of Australia an Act of the Imperial Parliament which repealed this "Constitutional Act," would be in the strictest sense a legal proceeding; "unconstitutional but legal," as they say in England.

J. B. T.

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**SELECT PLEAS OF THE FOREST.** Edited by G. J. Turner. Publications of the Selden Society, vol. 13. London: Bernard Quaritch. 1901. pp. cxxxix, 192. 4to.

One cannot examine this book without perceiving clearly why the extension of the royal forests contributed to the downfall of John, and why the revival of ancient forest rights contributed to the downfall of Charles the First. The book is indeed of vast interest both to students of English constitutional history and to persons in search of vivid presentations of mediæval society.

Heretofore Manwood's *Laws of the Forest* and Coke's *Fourth Institute*, chapter 73, have been the chief authorities upon the subject; but those old volumes cannot compete with this new one for the esteem of the reader who wishes to gain a lively conception of what the forest law actually was and what the forest courts actually did and what a man's life in the forest actually involved. It is one thing to be told by a treatise that the king had in ancient times the prerogative of declaring any part of the realm a forest, that in this forest game could not be disturbed by any one without the king's license, that in this forest the trees and the undergrowth had to be left undisturbed as homes for the game, that in this forest houses could not be built, that these regulations limited the rights of the persons nominally owning the land, and that all these regulations, and many more, were administered by courts composed of appointees of the crown, acting with severity in accordance with the interest of the appointing power; and it is quite another thing to read the memorials of the actual transactions of the forest authorities, containing small but dramatic pictures of the excitements of life in the precincts where every man was a poacher either *in esse* or *in posse* and was treated accordingly, where no man had the normal rights to use his own land as he wished, and where the possession of a bow or of fresh meat or of a stick of wood was an embarrassing piece of circumstantial evidence.

The extracts in this volume extend from 1209 to 1334, thus embracing the time of the Great Charter of 1215 and the Charter of the Forest of 1217. Upon almost every page may be found matter of lively interest; but the reader who is in too great haste to read the whole may be grateful for references to pages 2, 3, 9, 10, 14, 15, 18, 19, 21, 28, 84, 92, 94, 99-102, 110 and 119-121.

The Introduction, entitled *The Forests in the Thirteenth Century*, treats of: I. The Forest and the Beasts of the Forest; II. The Forest Officers;

III. The Lesser Courts of the Forest; IV. The Forest Eyre; V. The Regard; VI. The Clergy; VII. The Extent of the Forests; VIII. The Chase, the Park, and the Warren. The Introduction corrects errors found in Manwood's Laws of the Forest, and furnishes exactly the apparatus needed for intelligent examination of the extracts. It distinctly recognizes that the readers for whom the Selden Society's volumes are prepared wish to examine the documents for themselves and do not need to be told in the Introduction what they are to find in the documents. The work of the editor has included the preparation of an extremely useful Glossary.

E. W.

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A TREATISE ON FEDERAL PRACTICE, including practice in bankruptcy, admiralty, patent cases, foreclosure of railway mortgages, suits upon claims against the United States, equity pleading and practice, receivers and injunctions in the state courts. By Roger Foster. Third edition. Revised and enlarged. 2 vols. Chicago: Callaghan & Co. 1901. pp. clxxxv. 799, xi, 855. 8vo.

Practitioners will welcome a new edition of this useful text-book. The first edition, published in 1890, became inadequate almost immediately because of the passage in 1891 of the Evarts Act, creating the Circuit Courts of Appeals. A second edition was, therefore, issued in 1892. As the Judiciary Act of 1887, affecting the jurisdiction of the Circuit Courts, had then been in force but five years and the Evarts Act had been in force less than a year, many questions in regard to the construction of both acts, but especially the latter, had not been answered by the courts. During the past nine years much that was unsettled in 1892 has become clear, and the second edition had for some time been wholly inadequate. The new edition seems to have been carefully prepared. About two hundred pages have been added to the text, and the table of cases records nearly double the citations of the former edition. The subject of practice in bankruptcy is dealt with for the first time in this edition; the first chapter, which deals with the important subject of jurisdiction,—a subject especially affected by the recent statutes—has been expanded to about three times its former size, and large additions as well as judicious condensation are to be found in most of the chapters of the book. It is likely to add to its reputation as the best text-book on the subject with which it deals.

S. W.

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A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. By Henry Brannon. Cincinnati: W. H. Anderson and Co. 1901. pp. ix, 562. 8vo.

The purpose of the present work is to treat only the more important sections of the Fourteenth Amendment, that is, the first and the fifth. The author takes up the different rights and privileges which are conferred and attempts to show how the courts, in applying the very broad words of the amendment to the facts in different cases, have defined these rights, and what have been considered as within the letter or spirit of the provisions. In spite of the fact that the work is called by its author a "treatise," it is in reality little more than a compilation of decisions. There is almost no discussion of the underlying principles except such as is found in quotations from the opinions of the judges. The professed aim of the book is to present and make accessible materials for a study of the subject rather than to give a thorough analysis of the cases and of the different arguments. Naturally when such a method is adopted, there is little in the result to interest the student or the reader and it will be useful only to one searching for authorities. Such a treatment cannot be other than disappointing in view of the fact that the multitude of cases which have arisen and are constantly coming before the courts create a demand for a treatise in fact—a thorough and discriminating study of the limitations that have been made and of the reasons which have influenced the courts in arriving at their decisions.

The only assistance, however, that this work furnishes is that of a large collection of cases and an index which, while questionable as far as the arrangement and headings go, is full and minute.

Moreover the substance of the present work is still less to be commended. Some principles of constitutional law are fairly and correctly stated, but only too often the reasoning is weak and the need of careful discrimination is apparent. For example, in one place the author in treating citizenship says that "children born abroad of citizens temporarily residing abroad, though born abroad, are citizens because 'subject to the jurisdiction' of the United States in the same sense as ambassadors and thus under the amendment are citizens as they surely would be before it." This is unfortunately typical not only of the reasoning, but of the style and treatment throughout the book.

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**CYCLOPEDIA OF LAW AND PROCEDURE.** Edited by William Mack and Howard P. Nash. Vol. II. Affidavits to Appeal and Error. New York: The American Law Book Company. 1901. pp. 1093. 4to.

This is the second volume of the *Cyclopedia*, the first volume of which was reviewed in 15 *HARV. L. REV.* 245. In general it continues the plan of that volume. As space for the treatment of each subject is, in a work of this kind, necessarily restricted, it is natural, and perhaps inevitable, that the text should contain only a bare statement of the approximate result of the decisions, with little or no discussion of principles. The apparent effect is to make the work valuable mainly as an index to the cases and authorities.

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**BAILMENTS — A COMMENTARY ON THE LAW OF CUSTODY AND POSSESSION.** By Wyatt Paine. London: Sweet and Maxwell, Limited. 1901. pp. lxxxvi, 550. 8vo.

**A BRIEF ON THE MODES OF PROVING THE FACTS ON THE TRIAL OF CIVIL OR CRIMINAL CASES.** By Austin Abbott. Second edition by the publishers' editorial staff. Rochester: The Lawyers' Coöperative Publishing Co. 1901. pp. xxii, 653. 8vo.

**A HANDBOOK OF THE CODE OF CIVIL PROCEDURE.** By Carlos C. Alden. New York: Baker, Voorhis & Co. 1901. pp. vi, 170. 8vo.

**COMMERCIAL TRUSTS. THE GROWTH AND RIGHTS OF AGGREGATED CAPITAL.** By John R. Dos Passos. New York and London: G. P. Putnam's Sons. 1901. pp. viii, 137. 12mo.

**STUDIES IN HISTORY AND JURISPRUDENCE.** By James Bryce. New York and London: Oxford University Press, American Branch. 1901. pp. xxiii, 926. 8vo.

**A STUDY OF THE UNITED STATES STEEL CORPORATION IN ITS INDUSTRIAL AND LEGAL ASPECT.** By Horace L. Wilgus. Chicago: Callaghan & Co. 1901. pp. xiii, 222. 8vo.



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## COMPETITION AND THE LAW.

COMPETITION is considered here from the legal point of view — not from the economic point of view. The great mode of modern life, competition must have a place in law as well as a place in economics. For the law must deal with men as it finds them; the law must recognize that men are in a state of competition; concerning rights and wrongs in that competition, the law must have something to say. A first factor in society, competition must be a fundamental topic in law. It is true that competition does not appear as the usual name of a usual topic in the law, yet there is a set of rules in the law in relation to competition. It is proposed here to collect the more important of these rules; and the attempt will be made to collate them. To determine, that is, when competition is held no tort, and when competition is held a tort. All will be in outline. There will be hypothesis here without demonstration. General principles will be stated without proper qualifications. The large divisions of the subject will be exposed; but the special issues will not be brought forward. In fact, what is made here is a classification. The detail is left to the learning of the reader. Thus only principal cases will be discussed; and there will be small citation of authorities other than these. For all that is hoped to be come at is some disposition of competition by the law.

A first principal division of the subject is concerned with the extent to which competition is allowed. Is the competition in

every business open to every one? — this is the issue here. That certainly is not the fact in the world. The world as we know it has many limitations. Most of these are social barriers. So that the right at law is often an empty right. Yet men demand it. As competition is in the abstract elemental in our society, competition must be in the abstract fundamental in our law. To social barriers men submit — to no legal barriers. That is the general situation. At law we see the competition in almost every business is open to almost every man. Every man may keep a grocery if he wishes. But that is not true to the whole extent; for in certain businesses competition is limited by our laws. Every man may not run a street railway if he wishes. In the first case competition would be a right; in the second case competition would be a wrong. To a wide extent, then, competition is seen to be free; to a narrow extent competition is seen to be unfree. That is a line of demarcation to be established.

Let two early cases in our books be compared.<sup>1</sup> A master of a grammar school at Gloucester brought a writ of trespass against another master, and counted that the defendant had started a school in the same town, so that whereas the plaintiff had formerly received 40*d.* a quarter from each child, now he got only 12*d.* to his damage. Counsel contended that this interference shown and this damage proved made a good action on the case; he cited that the masters of Paul's claimed that there should be no other masters in all London except themselves. But the judge said: There is no ground to maintain this action; since the plaintiff has no estate but a ministry for the time; and though another equally competent with the plaintiff comes to teach the children, this is a virtuous and charitable thing, and an ease to the people, for which he cannot be punished by our law. Contrast with that case this case of the same century. The Prior of Dunstable brought a writ of trespass against J. B. of Dunstable, butcher, and counted that the right to the market in this vill belonged to the prior, but that nevertheless this butcher had sold his meats secretly upon his own premises upon a certain market day, to the wrong and to the damage of the prior. Counsel of the butcher argued that any one might in that vill sell his own goods on his own premises or anywhere else at his pleasure at any time. The judge said promptly that could not be; for the prior would lose all advantage of his franchise of the market, if one might sell his merchandise upon

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<sup>1</sup> Y. B. 11 Hen. IV. 47; Y. B. 11 Hen. VI. 19.

market day elsewhere than in the stalls of the prior, paying to him toll. The first case one sees holds that trade is free; more than that, it sets forth that competition should be free. The second case holds that where there is a franchise trade is not free; more than that, it decides that the policy of the law should be to defend franchise. Indeed, these cases stand at the parting of the ways. In the fifteenth century a society based upon unfree trade lay behind; and a society based upon free trade lay before. What with the many and various franchises that confronted one in the country,<sup>1</sup> what with the many and various guilds that barred one in the towns, it was clear what the policy of the state had been. Yet, at the same time, in a society based upon franchise, we find competition declared; for the times were even then at their change. The law of these two cases taken together is the law to-day: competition is no tort — unless there be invasion of a franchise. But the policy of the law has undergone a change: in those times, the courts looked askance at competition; in these times the courts look with disfavor upon franchise.

Indeed, that rule of law is so fundamental that the issue is not found to be in litigation in later books. *Snowden v. Noah*<sup>2</sup> may be such case. As soon as one party established a newspaper in opposition to the other party, that other asked for an injunction against solicitation of his customers. The Chancellor said: The business of publishing newspapers is free to all; the loss to one establishment which may follow from the competition of a rival establishment is a consequence of that freedom; mere competition, therefore, gives no claim for legal redress. Perhaps, *Pudsey Gas Company v. Bradford*<sup>3</sup> is such a case. There suit was based upon the diversion of consumers from one gas works to the other gas works. The decision was that the loss so caused, however great, could be no private injury on principle. Such a case seems *Ricker v. Railway*.<sup>4</sup> The proprietors of the Poland Spring had previously brought all comers to their hotels by stage from Danville Junc-

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<sup>1</sup> COMPETITION UNFREE: UNDER THE MANORIAL SYSTEM. — Y. B. 22 Ed. I. 270; Y. B. 3 Ed. III. 3; Y. B. 11 Hen. VI. 19; *Ferness v. Brooke*, Cro. Eliz. 203; *Boweston v. Hardy*, Cro. Eliz. 547; *Case of Forest*, Cro. Jac. 155; *Hix v. Gardner*, 2 Bulstrode 195; *Fitzswaller's Case*, 3 Keeble 242; *Mayor v. Lambert*, Willes 111. UNDER THE GILD SYSTEM. — *Davenant v. Hurdis*, Moore 245; *Weaver v. Brown*, Cro. Eliz. 803; *London's Case*, 5 Coke 616; *Wagoner's Case*, 8 Coke 121; *Franklin v. Green*, 1 Bulstrode 11; *Wannels v. London*, 1 Strange 675; *Cuddon v. Eatwick*, 1 Salk. 193; *Gunmakers v. Fell*, Willes 384; *R. v. Surgeon*, 2 Burr. 892; *R. v. Harmon*, 3 Burr. 1322.

<sup>2</sup> *Hopkins* Ch. 347.

<sup>3</sup> L. R. 15 Eq. 167.

<sup>4</sup> 90 Me. 395.

tion. Later, the defendant built a railway and established a station, Poland Springs, much nearer the hotels. It was held properly: Because the plaintiffs for a series of years had run a stage from Danville Junction afforded no legal right to exclude another route; all this was mere competition; therefore it was not open to legal objection. And this must be so that mere competition is no tort. Why, then, this effort in all modern cases to show something untoward in the competition? Indeed, it may be seen that such must have been the rule. Otherwise merchants would have been in ceaseless litigation. The inventor of the first type of the machine would have sued the inventor of the second type of the machine. And if these suits could have succeeded, that wide extent of modern trade would never have been reached. That quick march of the inventions would never have been made. There would have been no nineteenth century.

At times a judge will put a supposititious case, however. In *Commonwealth v. Hunt*,<sup>1</sup> Chief Justice Shaw imagines this case: Suppose a new baker sets up against an old baker. Prices are reduced; the old baker is damaged; he therefore sues. The chief justice says: No legal wrong is done; the same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition that the best interests of trade and industry are promoted; of this competition there are a thousand modern instances. In *Allen v. Flood*,<sup>2</sup> Lord James of Hereford proposes this case: An architect seeks to be employed to the exclusion of his rivals. He says: "My plans are the best, and following them will produce the best house at the least cost. Therefore employ me and not A. or B." Can these rivals sue? His Lordship says not, clearly: Every man's business is liable to be interfered with by such action; of course no suit can be brought for such interference; competition, indeed, represents interference; but it is in the interest of the community that competition should exist.<sup>3</sup> In *Doremus v. Hennessey*,<sup>4</sup> Justice Phillips supposes this case: one tradesman intends to drive his rival out of business. It is true that no one may invade the business of another without lawful cause, he says; but lawful competition is

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<sup>1</sup> 4 Met. 134.

<sup>2</sup> [1898] A. C. 179.

<sup>3</sup> FREE COMPETITION. — Y. B. 11 Hen. IV. 47; Y. B. 22 Hen. VI. 14; *Case of Monopolies*, 11 Coke 85; *Hopkins v. R. R.*, L. R. 2 Q. B. D. 224; *Pudsey Co. v. Bradford*, *supra*; *Ricker v. R. R.*, *supra*; *C. v. Hunt*, *supra*; *Snowden v. Noah*, *supra*. And see lists following.

<sup>4</sup> 176 Ill. 608.

always a justification. This, then, appears as the apology for this policy — a theory that a free competition is for the best interest of society. The law does its best when it gives to every man an equal chance. An economic theory, one sees, not a legal theory. The state permits the struggle of competition for its own ends.

There is an exception — franchise. The extent to which franchises shall be granted depends upon the fiat of the state. In a society founded upon competition, the state will be found to leave all but the whole field to competition ; yet there is a place for franchise. The state grants franchises for the ferry and the bridge, for the turnpike and the canal, for the railroad and the tram, for light and water, and for like businesses. And such franchises may be defended,<sup>1</sup> since in such public utilities it seems that competition does not work for the best interests of the public. The state may do well to withdraw such public services from the field of competition ; for it is no inconsistency not to apply a general principle in a situation where it is inapplicable. And experience has shown that when the field is left open to competition in these public services, there is an inevitable result — in the end it will be found that there is no competition ; and that the community must pay for the experiment. Moreover, the law puts upon these public callings which have more or less of monopoly most strict obligations. In a public calling all who apply must be served and served at reasonable rate ;<sup>2</sup> whilst in the private callings one may sell to whom one pleases at any price one pleases.<sup>3</sup> That is a proper distinction that the law makes between a non-competitive business and a competitive business. Note that in the public callings

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<sup>1</sup> **FRANCHISE.** — Binghamton Bridge, 3 Wall. 75 ; Gas Co. *v.* Light Co., 115 U. S. 650 ; Sands *v.* River Improvement, 123 U. S. 288 ; Coe *v.* R. R., 127 U. S. 40 ; Bartholomew *v.* Austin, 85 Fed. 359 ; Railway *v.* Railway, 2 Gray 1 ; Street Railway *v.* Street Railway, 69 Mo. 65 ; Donnelly *v.* Vandenberg, 3 Johns. 27 ; Patterson *v.* Wollman, 5 No. Dak. 608.

<sup>2</sup> **REGULATION OF NON-COMPETITIVE CALLINGS.** — Jackson *v.* Rogers, 2 Show. 327 ; Alnut *v.* Inglis, 12 East 527 ; Denton *v.* G. N. R. R., 5 E. & B. 860 ; Munn *v.* Ill., 94 U. S. 113 ; Railroad Commission Cases, 116 U. S. 307 ; Smythe *v.* Ames, 169 U. S. 466 ; Price *v.* Irrigating Co., 56 Cal. 431 ; State *v.* Portland Co., 153 Ind. 483 ; Publishing Co. *v.* Associated Press, 184 Ill. 438 ; Telephone Co. *v.* Telegraph Co., 66 Md. 399 ; Laurence *v.* Pullman Co., 144 Mass. 1 ; Messenger *v.* Pa. R. R., 8 Vroom 531 ; C. & M. R. R. *v.* B. & M. R. R., 67 N. H. 464 ; State *v.* C. N. O. & T. R. R., 47 Oh. St. 130 ; State *v.* Steele, 106 N. C. 766.

<sup>3</sup> **REGULATION OF COMPETITIVE CALLINGS.** — Brass *v.* Stoesser, 153 U. S. 391 ; Holden *v.* Hardy, 169 U. S. 360 ; Braceville Co. *v.* P., 147 Ill. 66 ; Brewster *v.* Miller, 101 Ky. 368 ; Singer *v.* Md., 72 Md. 464 ; Com. *v.* Perry, 155 Mass. 117 ; State *v.* Loomis, 115 Mo. 307 ; Matter of Jacobs, 98 N. Y. 98 ; State *v.* Dalton, 22 R. I. 77 ; Ladd *v.* Press, 53 Tex. 172.

there is not the regulation by competition ; while in the private callings there is always the regulation of competition. Hence, we see that the most rigid restrictions are placed by our laws upon the conduct of public callings, while a broad freedom to trade as one will is given by our laws to those in private callings. And, what is to the point here, it is because a public calling is so subject to public regulation, that there is no danger in the withdrawal of the regulation of competition.

At all events, the courts have no choice but to recognize the right created by such a grant of a franchise. Upon one ground alone the courts can dispute the grant : the lack of capacity in the grantor. In *Street Railway v. Street Railway*,<sup>1</sup> a municipality was held to have no power to grant an exclusive right to one street railway although the charter gave the municipality full power of regulation. Only when they must will the courts recognize such grants. But next in interpretation of the extent of the grant the courts have a policy. It is at that stage we find a stern rule — the rule of *Charles River Bridge v. Warren Bridge*.<sup>2</sup> In that particular case it was held that the authorization of a toll bridge did not prevent the authorization of a free bridge sixteen rods away. Since then it has been recognized that competition is never to be excluded unless there is express stipulation against it. The principle has had a further extension. In *Illinois Canal v. Chicago Railroad*,<sup>3</sup> the express franchise of a canal company was held not invaded by the construction of a parallel railway. Thus only that sort of competition which is by precise provision enjoined will be excluded. A modern instance is *Railway Company v. Telegraph Association*.<sup>4</sup> There a telephone company with a franchise was held to have no action against an electric traction company for disturbance of the established ground circuit of the telephone by the introduction of the ground circuit of the single trolley system of the railway. Apparently an express franchise does not avail against the conflict of new conditions. Such strict rules of construction as these could not be unless there were a certain cast in the minds of the courts — the large policy that competition shall be free cuts the grant down as much as interpretation may.<sup>5</sup> Of

<sup>1</sup> 79 Ala. 470.

<sup>2</sup> 11 Pet. 420.

<sup>3</sup> 14 Ill. 314.

<sup>4</sup> 48 Oh. St. 390.

<sup>5</sup> EXTENT OF FRANCHISE. — *Charles River Bridge v. Warren Bridge*, *supra* ; *Horse Railway v. Cable Road*, 30 Fed. 388 ; *Gas Co. v. Saginaw*, 28 Fed. 529 ; *Street Railway v. Street Railway*, *supra* ; *Gas Co. v. Gas Co.*, 25 Conn. 19 ; *Canal v. Railroad*, *supra* ; *Water Co. v. Syracuse*, 116 N. Y. 178 ; *Railway Co. v. Telegraph Assn.*, *supra* ; *Parkhurst v. R. R.*, 23 Ore. 474 ; *Brenham v. Brenham Water Co.*, 67 Tex. 567 ; *Turnpike Co. v. R. R.*, 21 Vt. 895 ; *Canal v. R. R.*, 11 Leigh 73.



course if there be an express franchise and if there be a clear invasion, the courts must declare that competition a tort.

A second principal division of the subject is concerned with the methods by which competition is allowed. May competition be carried on by every method? — this is the issue here. Common knowledge of business transactions shows many limitations. Certain methods of getting trade are held permissible; certain other methods of getting trade are held not permissible. The law must leave the widest scope possible to methods in trade; and yet there are certain rights here that must be protected from violation. The law draws lines here. Suppose in one case a customer is taken from a rival by mere persuasion, obviously the rival has no suit. But suppose a customer is taken from a rival by open violence, obviously then the rival has a suit. In the first case the method of competition is held to be fair; in the second case the method of competition is held to be unfair.

What competition, then, is held fair? Perhaps as good a case as any to show what is permitted is *Ayer v. Rushton*.<sup>1</sup> The defendant in that case put a sign in front of his store: Depot of the Cherry Pectoral Company. The defendant also instructed his clerks to say: Rushton's Pectoral was much better than Ayer's Pectoral. The defendant also posted a placard: Ayer's Pectoral, one dollar; Rushton's Pectoral, 50 cents — which will you have? Of course it was held that all this was no more than fair competition. For is it not fair to sell goods under their proper names, even if thereby advantage is taken to some extent of the trade established by a rival? *Parsons v. Gillespie*<sup>2</sup> is a principal case upon that point. The plaintiff was first in the field with flaked oatmeal; but that it was held did not exclude a rival from producing by the same process and offering for sale under the same name the same product. If that were not so there would be an end to competition. And is it not fair to open another shop even if some trade is diverted? In *Choynski v. Cohen*,<sup>3</sup> the plaintiff first opened an "Antiquarian Book Store," then the defendant opened an "Antiquarian Book Store." The court said: The defendant had only described his store; any one might open a ladies' shoe store; it was no different here. And is it not fair to claim the same advantages for your wares as for wares of a rival? In *Tallerman v. Dowsing Heat Company*,<sup>4</sup> the proprietor of one heat treatment was first to operate. The system got some commendation from the medical peri-

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<sup>1</sup> 7 Daly 9.

<sup>2</sup> [1898] A. C. 239.

<sup>3</sup> 39 Cal. 501.

<sup>4</sup> [1900] 1 Ch. 1.

odicals. So, when the defendant entered the field, he instanced these testimonials as commendation of the heat treatment in general. The court refused to interfere. And is it not fair to compare goods of the seller with the goods of a rival? *White v. Mellin*<sup>1</sup> is the leading case as to that. The proprietor of one food advertised: Dr. Vance's food is far more nutritious and healthful than any other preparation. The proprietors of Mellen's food sued for the disparagement. It was held: Advertisements of this sort appear fair enough; every extravagant praise may be used by a tradesman in commendation of his own goods; it may attract trade to him and diminish the business of others; but of such disparagement by comparison the law takes no cognizance. And is it not fair for one tradesman to undersell another? *Ajello v. Worsley*<sup>2</sup> decides that. Ajello was a maker of pianos, and Worsley was the proprietor of a furniture emporium. Worsley testified that his business policy was to select a certain line of goods to sell below cost; thereby he would get customers into his establishment to buy other goods priced to yield a good profit. In this particular case he marked down a piano of the Ajello make; and the result was that no other retailer could afford to sell the Ajello piano. Now Ajello sues Worsley for the damage to his trade. The court holds: There is no cause of action; the owner of property may dispose of it for such price as he sees fit; a trader is entitled to carry on his business in any lawful way, whether it causes loss to others in the trade or not. And may a trader say it is not fair if a rival has made an arrangement which is to his prejudice? In *Walsh v. Dwight*<sup>3</sup> it appears that contracts were entered into by the manufacturers of Cow Brand Saleratus with the jobbers of the commodity, by which the jobbers agreed not to sell any other brand of saleratus below the price of the Cow Brand. The Cow Brand was widely advertised; hence the other brands could not be sold at the same price; thus the scheme damaged the manufacturers of the other brands; but they recovered nothing at law. It is clear that in the last analysis there is nothing done in all these cases that is not usual in competition; nor is anything done that is not proper in competition;<sup>4</sup> for indeed these methods are the

<sup>1</sup> [1895] A. C. 154.

<sup>2</sup> [1898] 1 Ch. 274.

<sup>3</sup> 40 N. Y. App. D. 513.

<sup>4</sup> COMPETITION FAIR. — *Evans v. Harlow*, 5 Q. B. 624; *Younge v. McCrae*, 3 B. & S. 634; *Jenner v. Abeckett*, L. R. 7 Q. B. D. 11; *White v. Mellen*, *supra*; *Parson v. Gillespie*, *supra*; *Ajello v. Worsley*, *supra*; *Tallerman v. Dowsing Co.*, *supra*; *Print Works v. Dry Goods Co.*, 105 Fed. 163; *Choynski v. Cohen*, *supra*; *Cohn v. Lahn*, 26 Alb. L. J. 342; *Johnson v. Hitchcock*, 15 Johns. 185; *Tobias v. Harland*, 4 Wend. 537; *Lovell Co. v. Houghton*, 54 N. Y. Supr. Ct. 60; *Ayer v. Rushton*, *supra*; *Walsh v. Dwight*, *supra*. And compare lists following.



very processes of competition ; and if these methods were not allowed in competition that whole benefit from competition for which society stipulates would cease.

What competition, then, is held unfair? Certain methods in competition it has been seen are fair ; while certain other methods it will be seen are unfair. All depends upon the method practised in the particular case. Suppose competition be defined in the abstract case as the diversion of a customer from one competitor to another. Then it occurs to inquire as to the position of the customer. Put this case: The customer is under a contract to deal with the first merchant. Then put this case: the customer is dealing with the first merchant, but there is no contract. There is a distinction here. In the one case a second merchant must, to succeed in competition, induce the customer to break his contract with the first merchant ; it seems that there may be found an element of wrong in such competition. In the other case there is, as has been seen, no tort in the mere competition ; what must be attacked is the means employed to divert the customer.

Of that first situation the leading case, as is well known, is *Lumley v. Gye*.<sup>1</sup> There it will be remembered a Miss Wagner was under contract to sing for the first manager ; the second manager induced Miss Wagner to break her contract and perform for him ; and the court held this a tort. The decision is grounded upon the ancient action for enticement of a servant ; but certain of the judges indicated a wider ground. One says : Suppose a trader with intent to ruin a rival trader goes to a banker who owes money to his rival and begs him not to pay the money which he owes him, and by that means ruins his rival, — it seems that an action could be maintained. *Exchange Telegraph Company v. Gregory*<sup>2</sup> raises the same issue. Plaintiff furnished the official news service from the London Stock Exchange. The brokers, the customers, were obliged to contract not to furnish the tape news to non-subscribers. One customer furnished the quotations to the defendant, an outside broker, who published them. Here it is seen the competition was carried on by inducing customers to break their contracts. The court in granting the plaintiff an injunction said : This is a mean and contemptible act ; this is an illegal and unjustifiable act ; this is an invasion of a right. In *Heaton Button Company v. Dick*,<sup>3</sup> the business necessity of such a result also appears.

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<sup>1</sup> 2 E. & B. 216.

<sup>2</sup> [1896] 1 Q. B. 147.

<sup>3</sup> 55 Fed. 23.

Plaintiffs sold button fastening machines to shoe manufacturers with provision that all staples used in the machines should be bought of them; and the defendants induced the shoe manufacturers to break the contract and buy staples of them. The court granted an injunction against such competition.<sup>1</sup> Of course it is the customer that breaks the contract in these cases. The wrong by the second merchant is the destruction of the contract right of the first merchant. That is tortious *per se*; therefore, that is unfair competition. And it is believed it is also the sense of the business community, that where a contract intervenes competition is barred.

Of that second situation is the mass of cases brought before the courts upon unfair competition. The customer is open to all — he may have him who can get him. But the customer must be gotten by fair methods; but unfair methods may not be used. With certain unfair methods the courts deal promptly; while with certain other unfair methods the courts deal hesitantly. That seems to be because a theory which serves well enough in the obvious cases of unfair competition fails when applied to the obscure cases of unfair competition. But by any theory certain methods are unfair: fraud is unfair; disparagement is unfair; coercion is unfair. In these large divisions many torts are grouped; the classification is untechnical; yet such wide divisions may be useful.

Competition may not be carried on by fraud. Unfair competition of this sort has become too common in modern trade; but the courts bid fair to check it. Perhaps *Wamsutta Mills v. Fox*<sup>2</sup> is as plain as any case. A dry goods store advertised: Men's Laundered Shirts, Wamsutta Cotton, 67c. The shirts were not made of cotton from the Wamsutta Mills, but from an inferior cotton from other mills. Wamsutta Mills may have an injunction.<sup>3</sup> *Morgan v. Wendover*<sup>4</sup> is plain fraud also. When persons came to

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<sup>1</sup> INDUCEMENT OF BREACH OF CONTRACT UNFAIR. — *Exchange Telegraph Co. v. Gregory*, *supra*; *Hewitt v. Ontario Co.*, 44 Upp. C. Q. B. 287; *Angle v. R. R.*, 151 U. S. 1; *R. R. v. McConnell*, 82 Fed. 65; *Chipley v. Atkinson*, 23 Fla. 206; *May v. Woods*, 172 Mass. 11; *Delz v. Winfree*, 80 Tex. 400; *Duffies v. Duffies*, 76 Wis. 374; *Boyson v. Thorn*, 98 Cal. 578; *Ashley v. Dixon*, 48 N. Y. 430; *Chambers v. Baldwin*, 91 Ky. 158; *Land Co. v. Commission Co.*, 138 Mo. 439.

<sup>2</sup> 49 Fed. 141.

<sup>3</sup> FRAUD UNFAIR. — *Howe v. McKernan*, 30 Beav. 547; *Chapleau v. La Porte*, 16 Rap. Que. 189; *Lawrence Co. v. Tenn. Co.*, 138 U. S. 537; *Evans v. Von Laer*, 32 Fed. 153; *Jewell v. Bigelow*, 66 Ill. 452; *Marsh v. Billings*, 7 Cush. 322; *Hughes v. McDonough*, *infra*; *Rice v. Manley*, 66 N. Y. 82. And add lists following.

<sup>4</sup> 43 Fed. 420.

the defendant's store and asked for Sapolio, the salesman would without explanation wrap up another soap. The plaintiffs, proprietors of Sapolio, may have an injunction against such substitution.<sup>1</sup> *Hughes v. McDonough*<sup>2</sup> is peculiar. Plaintiff, a blacksmith, had shod a horse of a customer in a proper manner. Defendant surreptitiously drew nails from the shoe so that the shoe soon came off; the special damage laid was the loss of the customer; and the court held that these things made out a tort. *Coates v. Holbrook*<sup>3</sup> opens another field. Defendant sold thread dressed with labels like labels of the plaintiff's. An injunction was properly granted. *Cook v. Ross*<sup>4</sup> is the modern form of that fraud. Bottlers of whiskey put their product upon the market in a strange square bottle with a long neck. Rival bottlers later put their product on the market in bottles of the same general appearance. The resemblance was enough to mislead ordinary customers. Properly whenever such imitation of the dress appears injunction is promptly given.<sup>5</sup> So the proprietors of Uneeda Biscuit have an injunction against the proprietors of Iwanta Biscuit in *National Biscuit Company v. Baker*.<sup>6</sup> The fraud is infringement of the trade name.<sup>7</sup> These principles go far. According to *Reddaway v. Banham*,<sup>8</sup> if the product of one trader is established in the market under the name of "Camels Hair Belting," another trader may not put his camels hair belting upon the market without taking measures to prevent confusion. Similarly *American Watch Company v. United States Watch Company*<sup>9</sup> holds that if the watches of one manufactory

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<sup>1</sup> FRAUD BY SUBSTITUTION OF GOODS. — *Barnet v. Leuchars*, 13 L. T. 495; *Saxlehner v. Eisener*, 88 Fed. 61; *Medical Tea Co. v. Kirchstein*, 101 Fed. 580; *Avery v. Merkle*, 81 Ky. 75; *Stonebrecker v. Stonebrecker*, 33 Md. 252; *Moroe v. Smith*, 13 N. Y. S. 708.

<sup>2</sup> 43 N. J. L. 459.

<sup>3</sup> 2 Sandf. Ch. 586.

<sup>4</sup> 73 Fed. 203.

<sup>5</sup> FRAUD BY IMITATION OF DRESS. — *Knott v. Morgan*, 2 Keene 213; *Blofield v. Payne*, 4 B. & Ad. 410; *Aver v. Goodwin*, 30 Ch. D. 1; *Coates v. Merrick*, 149 U. S. 562; *Sawyer v. Hubbard*, 32 Fed. 388; *Fairbanks Co. v. Bell Co.*, 77 Fed. 869; *Dennison Co. v. Thomas Co.*, 94 Fed. 651; *Hires v. Consumers' Co.*, 100 Fed. 809; *Awl Co. v. Awl Co.*, 168 Mass. 154; *Williams v. Spenser*, 25 How. Pr. 365.

<sup>6</sup> 95 Fed. 135.

<sup>7</sup> FRAUD BY INFRINGEMENT OF TRADE DESIGNATION. — *Crawshay v. Thompson*, 4 M. & G. 357; *Johnson v. Ewing*, 7 A. C. 219; *Witherspoon v. Currie*, L. R. 5 H. L. 508; *Reddaway v. Banham*, *infra*; *Birmingham Co. v. Rowell*, [1897] A. C. 710; *Walker v. Alley*, B. Grant, Ch. 366; *Canal Co. v. Clark*, 13 Wall. 11; *Hilson Co. v. Foster*, 80 Fed. 896; *Mossler v. Jacobs*, 68 Ill. App. 571; *Waltham Co. v. U. S. Co.* *infra*; *Saunders v. Jacobs*, 20 Mo. App. 96.

<sup>8</sup> [1896] A. C. 199.

<sup>9</sup> 173 Mass. 85.

are known to the trade as Waltham Watches, another manufactory at Waltham cannot sell its watches as Waltham Watches without sufficient precautions against deceit. And in an extreme case, *W. H. Baker Company v. Sanders*,<sup>1</sup> it is held that since the product of the plaintiff establishment has long been sold in the market as Baker's Chocolate, another named Baker cannot, without distinctions, sell his product as Baker's Chocolate.<sup>2</sup> It will be agreed that a proper result is reached in these cases. As all these defendants have committed frauds ; therefore they have laid themselves open to suit. But notice what the plaintiffs complain of here is the diversion of custom — unfair competition.

Competition may not be carried on by disparagement. Actions of many sorts may be brought together under this head. An early case, *Harman v. Delany*,<sup>3</sup> is an instance. There one gunsmith advertised this of his rival : Whereas John Harman claims to make guns of two feet six inches to exceed any made by others of a foot longer this is to advise all gentlemen that said gunsmith does not dare to engage with any artist in town nor ever did make such an experiment except out of a leather gun. The court said : The law has always been very tender of this reputation of tradesmen ; and therefore these words spoken of the plaintiff in the way of his trade will bear an action.<sup>4</sup> *Davy v. Davy*<sup>5</sup> is a modern instance. This notice was issued by one grocer of another grocer : An unscrupulous grocer advertises Davy's teas and coffees with a view to deceive the public and may sell an inferior article. It was held : Such a publication could have but one purpose, namely, to injure the plaintiff in his business ; and would therefore be clearly libellous *per se*. In *Western Manure Company v. Lawes Manure Company*<sup>6</sup> the disparagement is of the goods. The case grew out of certain chemical tests of the artificial fertilizers of the respective

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<sup>1</sup> 80 Fed. 889.

<sup>2</sup> FRAUD BY DECEIT AS TO THE SELLER. — *Croft v. Day*, 7 Beav. 84 ; *Turton v. Turton*, 42 Ch. D. 128 ; *Brewing Co. v. Brewing Co.*, 1898, 1 Ch. 539 ; *Singer Co. v. June Co.*, 163 U. S. 109 ; *Pillsbury v. Pillsbury Co.*, 64 Fed. 841 ; *Allegreth Co. v. Keller*, 85 Fed. 643 ; *Chaney v. Hoxie*, 143 Mass. 502 ; *Meyers v. Buggy Co.*, 54 Mich. 215 ; *Hall's Appeal*, 60 Pa. 158.

<sup>3</sup> 2 Strange 898.

<sup>4</sup> DEFAMATION UNFAIR. — *Jones v. Littler*, 7 M. & W. 423 ; *Morrison v. Harmer*, 3 Bing. N. C. 759 ; *Lattimer v. News*, 25 L. T. 44 ; *South Heddon Co. v. Assn.*, [1894] 1 Q. B. 139 ; *Australian Co. v. Bennett*, [1894] A. C. 284 ; *Johnson v. Robinson*, 8 Post 486 ; *Sumner v. Otley*, 7 Conn. 257 ; *Richie v. Widdemer*, 59 N. J. L. 290 ; *Morcasse v. Brochu*, 154 Mass. 567 ; *Simmons v. Burnham*, 107 Mich. 189 ; *Davy v. Davy*, *infra*.

<sup>5</sup> 50 N. Y. S. 161.

<sup>6</sup> L. R. 9 Exch. 218.

companies, undertaken at the instance of the defendant company. The defendant's expert reported that the plaintiff's manure was of inferior quality. The plaintiff brought suit. In its declaration it declares the disparagement; it avers that the statement is wholly false; and it shows as special damage loss of custom. Upon demurrer that declaration is held good.<sup>1</sup> *Paul v. Halferty*<sup>2</sup> is more obvious. Plaintiff was about to make a sale of some mineral lands to a customer. Defendant intervened; he stated that the ore was played out; the statement was false and the defendant knew it was false. This is held a tort. In *Ravenhill v. Upcott*<sup>3</sup> the tort was admitted at the trial. The plaintiff had advertised for sale the Horsehill Estate. The defendant had inserted a false notice: Persons should be cautioned not to buy at that sale as the heirs are still alive.<sup>4</sup> The same point is seen in *Lewin v. Welsbach Company*,<sup>5</sup> a bill setting forth that defendants have sent to the trade a false, malicious, and intimidating circular, to the effect that the plaintiffs are infringing patents of the defendants, is good upon demurrer. In the law of torts these various actions have various names: Defamation, Trade Libel, Slander of Title. In regard to each are many technicalities; but considered in a large way these cases are to the same effect. A disparaging statement is made; the statement is false; damage to the trade results. Methods of this sort are tortious *per se*. Yet notice again that the gravamen is the diversion of custom — unfair competition.

Competition may not be carried on by coercion. The early cases show that issue in simplicity. *Keeble v. Hickeringill*<sup>6</sup> is an elemental case. Keeble had a decoy. Hickeringill discharged six guns laden with gunpowder, and with the noise did drive away the

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<sup>1</sup> DISPARAGEMENT OF GOODS UNFAIR. — *Fen v. Dixie*, Wm. Jones 444; *Western Co. v. Lawes Co.*, *supra*; *R. R. v. Press Co.*, 48 Fed. 206; *American Co. v. Gates*, 85 Fed. 729; *Wilson v. Dubois*, 35 Minn. 471; *Mer v. Allen*, 51 N. H. 177; *Tobias v. Harland*, 4 Wend. 537; *Lubricating Co. v. Oil Co.*, 42 Hun 153; *Paul v. Halferty*, *infra*.

<sup>2</sup> 63 Pa. 46.

<sup>3</sup> 33 Justice of Peace 299.

<sup>4</sup> SLANDER OF TITLE UNFAIR. — *Pennyman v. Reabanks*, Cro. Eliz. 427; *Malachy v. Soper*, 3 Bing. N. C. 371; *Halsey v. Brotherhood*, 19 Ch. D. 386; *Ravenhill v. Upcott*, *supra*; *Alford v. Choate*, 20 Upp. Can. C. P. 471; *Lewin v. Welsbach Co.*, *infra*; *Collins v. Whitehead*, 34 Fed. 121; *Hill v. Ward*, 13 Ala. 310; *McDaniel v. Baca*, 2 Cal 326; *Webb v. Cecil*, 9 B. Mon. 198; *Swan v. Toppan*, 5 Cush. 104; *Dodge v. Colby*, 108 N. Y. 445.

<sup>5</sup> 81 Fed. 904.

<sup>6</sup> 11 East 574 n.

wild fowl. It is decided: Where a violent act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases; but if a man doth him damage by using the same employment, no action would lie for spoiling the custom, because he has as much liberty to carry on a trade as the plaintiff. *Tarleton v. McGawley*<sup>1</sup> is most obvious. The master of the ship *Bannister* was trading with the natives on the coast of Africa; and the master of the ship *Othello* put an end to that trade by firing upon the natives in their canoe. Action lay for the interference; for that must be a tort when violence is used by a competitor to keep customers away from a rival.<sup>2</sup> In *Railroad Company v. Hunt*<sup>3</sup> an engineer was arrested for some malicious reason; and the company properly was given an action for interference with its business. And the principle should apply, whatever the nature of the legal wrong. *Mobile v. Water Supply Co.*<sup>4</sup> may be cited here. In that case the city constructed a water system and a sewer system. Then it instituted competition against the existing water supply company by charging customers of that company the same price for sewage that it charged others for both water and sewage. This discrimination in public calling is held unfair competition. In all of these cases what is done by the defendant is tortious *per se*. But note again that the complaint of the plaintiff is diversion of custom by an unfair method.

It is agreed that competition by these methods is actionable—fraud, disparagement, coercion. The problem now is upon what ground does the competitor sue. One theory is brief. It is said there is a recognized tort here. The defendant has perpetrated a fraud; or the defendant has made a false statement; or the defendant has used force. These things it is said are tortious *per se*. But why are these torts against the competitor? For instance, one competitor wraps goods in a package similar to the package of his competitor. The customer is deceived into buying the goods of the one for the goods of the other. The customer therefore can

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<sup>1</sup> Peake 205.

<sup>2</sup> COERCION UNFAIR. — *Garrett v. Taylor*, Cro. Jac. 567; *Iverson v. Moore*, 1 Salk. 15; *Keeble v. Hickeringill*, *supra*; *Carrington v. Taylor*, 11 East 571; *Tarleton v. McGawley*, *supra*; *Ibbotson v. Peat*, 3 H. & C. 644; *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290; *Higgins v. O'Donnell*, Ir. R. 4 C. L. 91; *Springhead Co. v. Riley*, L. R. 6 Eq. 551; *Dominion Co. v. McKenna*, 30 Fed. 48; *R. R. v. R. R.*, 54 Fed. 730; *Hopkins v. Stave Co.*, 83 Fed. 912; *Wire Co. v. Wire Union*, 90 Fed. 608; *Barr v. Trades Council*, 53 N. J. Eq. 101; *Vegelahn v. Guntner*, 167 Mass. 92.

<sup>3</sup> 55 Vt. 570.

<sup>4</sup> 30 So. 445.



declare in deceit. But the competitor was never deceived for one minute by what was done. He cannot declare in deceit. His complaint must be that his customer is taken from him and taken by a fraudulent method. Upon a like foundation is the complaint of the competitor in case of disparagement. In slander of title, for instance, the seller who sues the liar knows that the lie is a lie. The real basis of his complaint is that a customer is lost to him and taken from him by a lie told his customer. This discrimination is most obvious in the case of coercion. For instance, one tradesman uses force to keep a customer from the shop of a rival tradesman. The customer may of course sue for assault and battery. May the rival tradesman who was not present sue for assault and battery? Obviously not; and yet he has his suit. That is the distinction proposed here. The suit of the tradesman is not for the tort of assault and battery—he has never been assaulted and beaten. The declaration of the tradesman is: that there has been an invasion of his business right; that a customer has been kept away by a method tortious *per se*; that the act is therefore without justification. This other theory, one sees, is long.

One difficulty with the briefer theory is that it does not explain the situation; another difficulty is its limitation, for unless the interference with the customer by one competitor is a tort against the customer, the competitor who is damaged can have no action by the briefer theory under any circumstance whatever. In this longer theory there is a possibility of further application if there be necessity. Let two cases be compared. In *Graham v. Street Railway*,<sup>1</sup> a foreman posted a notice that employees dealing with a certain grocer would be discharged. The court holds that the grocer has an action, on the ground that there is malicious interference with his business. On the other hand, in *Robinson v. Texas Land Association*,<sup>2</sup> a corporation gave its employees the option to deal at the company store or leave the employment. But the court holds that a rival storekeeper has no action for such interference. Now it is submitted that both cases are rightly decided; and this is the explanation offered. In neither case, it is to be noted, is any tort committed against the customers; but in both cases there is a *prima facie* tort against the tradesman,—the intentional invasion of his business right to have customers come undisturbed. In the first case that interference is done with

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<sup>1</sup> 47 La. Ann. 214.

<sup>2</sup> 40 S. W. 843.

a motive that cannot be justified — malice. In the second case that is done with a justification — competition. This involves the recognition of a *prima facie* right to have customers come to one undisturbed. This also necessitates the acknowledgment that when a customer is taken away there is a *prima facie* tort. This also requires the establishment of a justification for fair competition. But it is not impossible that all this may be.

The same distinction is taken in two Minnesota cases. In *Bohn Manufacturing Company v. Hollis*,<sup>1</sup> the case first decided, certain retail lumber dealers refused to deal with a wholesale dealer who sold lumber direct, — this was held no tort. In *Ertz v. Produce Exchange*,<sup>2</sup> it appeared that without cause the members of the Exchange had refused to have dealings with a certain commission merchant, — this was held a tort. The court claims the right to hold one way in the first case and another way in the second case. It is said: The defendants had similar legitimate interests of their own to protect in the first case which were menaced by the practice of wholesale dealers in selling direct to consumers; but in the second case from all that appears there was the sole purpose of injuring the plaintiff's business. In other words, it is held a tort to interfere with the business of a man; but if that interference is in the course of competition, there is a justification allowed. By such a distinction as this many other cases which by the briefer theory cannot be reconciled are by the longer theory accommodated. Moreover, the theory that there must be an act done tortious *per se* against the customer is of too limited application. In the course of modern trade most serious wrongs may be done a merchant by most despicable means without the commission of any tort against the customer. Shall the person who diverts the custom without any justification go free? If so the law will be found in crucial instances to furnish a most inadequate protection against oppression; but if, on the other hand, the one who interferes with the business of another is put to his justification, the law furnishes a complete remedy, excusing no man who does not show his excuse.

It is this same issue that one sees exposed in a succession of cases in Massachusetts. In *Vegelahn v. Guntner*,<sup>3</sup> it appeared from the report that some upholsterers had gone upon a strike for higher wages. The method they employed to keep other workmen from coming to fill their places was in some cases violence, and was in

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<sup>1</sup> 54 Minn. 223.

<sup>2</sup> 79 Minn. 140.

167 Mass. 92.



some cases persuasion. The majority of the court forbade the picket altogether. Mr. Justice Holmes thought that violence should be enjoined, but not persuasion: the conflict between employers and employed is, he said, competition; competition justifies the intentional infliction of damage by interference with a man's business, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade; this is permitted upon considerations of policy and of social advantage. In *Plant v. Woods*,<sup>1</sup> it appeared that there were two labor unions in the same craft, and that one union had threatened a strike if members of the other union were retained in the employment. The majority of the court again forbade this altogether. Mr. Justice Holmes again dissented: this mode of approaching the question I believe to be the correct one, he said. I agree that the conduct of the defendants is actionable unless justified; I agree that the presence or absence of justification may depend upon the object of their conduct, that is, upon the motive with which they acted; I think that here the unity of organization aimed at is necessary to make the contest of labor effectual. In *Moran v. Dumphy*<sup>2</sup> one count was for inducing the employer to discharge the plaintiff from his employ by malevolent advice. Mr. Chief Justice Holmes spoke for the court in this case; he said: It must now be taken to be settled that while intentional interference may be privileged if for certain purposes, yet, if due only to malevolence it must be answered for; that the notion that the employer's immunity must be a non-conductor so far as any remote liability is concerned is disposed of; finally, we see no sound distinction between persuading by malevolent advice and accomplishing the same result by falsehood or putting in fear. Mr. Chief Justice Holmes is cited at length here because the theory that is put forward in this article is owed to him more than to any one else.

Let this hypothesis be applied to the most important cases in English law upon this subject in late years. In *Mogul Steamship Company v. McGregor*,<sup>3</sup> the defendants drove the plaintiffs from the trade by smashing the freights and by giving a special rebate in addition to those that shipped by the defendant's lines exclusively. It is said in that case: The courts could not attempt to limit competition to a normal standard of prices — there is no such limitation; nor could they enjoin the defendants from forcing customers to come to them by this device of the differen-

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<sup>1</sup> 176 Mass. 492.<sup>2</sup> 177 Mass. 485.<sup>3</sup> L. R. 23 Q. B. D. 598.

tial rate — that is no more than competition. It is suggested that *Allen v. Flood*<sup>1</sup> might well have been so decided on its facts. In that case it seems a *prima facie* tort against the man discharged for the representative of one union to demand the discharge of that member of the other union. The competition existing between the unions might, however, be a justification. The *ratio decidendi* of the majority in the House of Lords is indeed to the contrary. It is said that there are no *prima facie* torts. That view seems destined to have less influence upon the law than was at first supposed, if we are to judge by the subsequent course of decision. For now *Quinn v. Leatham*<sup>2</sup> is the ruling case. The plaintiff in this case was a flesher, the defendant was an official in a butcher's union. Because the plaintiff would not discharge a non-union man, the defendant threatened a strike against one of the plaintiff's customers unless he refused to deal with the plaintiff. The customer acceded; and the plaintiff was ruined. The House of Lords held that all this made out a tort. Upon these reasons it seems: first, that a tradesman has a right to have his dealings with his customers undisturbed; second, that an intentional invasion of that right may result in a legal wrong to the tradesman, although the customer suffer no legal wrong; third, that unless a good justification for what has been done is put forward the tort must be answered for; fourth, if what is done is tortious *per se* — conspiracy in the principal case — there can be no justification possible.

At all events this hypothesis is here defended. Competition is not of the nature of an absolute right. Rather competition is of the nature of a justification, allowed at the present because of present policy. In the process of competition may be pointed out every element of a *prima facie* tort. In certain instances that cannot be justified. The courts are quite prepared to say upon established principles that if the act of interference be a fraud or a disparagement or a coercion against the customer — they will not listen to any justification. More than that: if the method of competition be not tortious *per se*, but be of a sort that the community should condemn, the courts grant no justification for that *prima facie* tort.<sup>3</sup> That makes the standard of what methods shall be considered unfair in competition and what methods shall be consid-

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<sup>1</sup> [1898] A. C. 1.

<sup>2</sup> [1901] A. C. 495.

<sup>3</sup> COMPETITION WITHOUT LEGAL WRONG TO THE CUSTOMER UNFAIR. — *Temperton v. Russell*, [1893] 1 Q. B. 715; *Quinn v. Leatham*, *supra*; *Glass Mfg. v. Bottle*

ered fair in competition the sense of the business community at last. There that issue is well rested. It remains true that any competition whatever has every element of a *prima facie* tort. How, then, can competition be a justification, even when it is fair? There can be but one ground for that justification — public policy. That competition in the general case and by the usual methods should be free is the economic ideal of our time. Free competition is held worth more to society than it costs. And the judges have the same social imagination as other men. Therefore, although interference with the business of another is a tort — fair competition is a justification. There is no principle of law here; the discussion of the question belongs to economics, not to law. Unless, indeed, this be a principle of law: whenever the mass of men firmly believe that a certain policy is for their social advantage — that policy will be found to be at the same time the policy of the law.

*Bruce Wyman.*

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Blowers, 59 N. J. Eq. 49; *Graham v. St. R. R.*, *supra*; *Lucke v. Assembly*, 77 Md. 396; *Vegelahn v. Guntner*, *supra*; *Plant v. Woods*, *supra*; *Ertz v. Produce Exchange*, *supra*; *P. v. Duke*, 44 N. Y. S. 336; *Curran v. Galen*, 152 N. Y. 33; *Crawford v. Wick*, 18 Oh. St. 190; *Mattison v. R. R.*, 3 Oh. Dec. 526; *Payne v. R. R.*, 3 Lea 507; *Bailey v. Plumbers' Assn.*, 103 Tenn. 99; *Delz v. Winfree*, 80 Tex. 400.

WHEN FAIR. — *Mogul S. S. Co. v. McGregor*, *supra*; *Lyons v. Wilkins*, 67 L. J. Ch. 383; *Jenkinson v. Nield*, 8 Times L. R. 421; *Allen v. Flood*, *supra*; *Boots Co. v. Grundy*, 82 L. T. 769; *Clemmet v. Watson*, 14 Ind. App. 38; *Meyer v. Stone Cutters*, 47 N. J. Eq. 519; *Brewster v. Miller*, 101 Ky. 368; *Bohn Co. v. Hollis*, *supra*; *Heyward v. Tillson*, 75 Me. 225; *Knights v. Laborers*, 60 N. Y. S. 388; *Tube Co. v. Allied Mechanics*, 7 Oh. N. P. 87; *McCauley v. Tierney*, 14 R. I. 255; *Robinson v. Land Assn.*, *supra*; *Raycroft v. Traintor*, 68 Vt. 219.

## SIR SAMUEL ROMILLY AND CRIMINAL LAW REFORM.<sup>1</sup>

"RELIGION," says Dr. Johnson, in his life of Milton, "of which the rewards are distant and which is animated only by faith and hope, will glide by degrees out of the mind unless it be invigorated and reimpresed by external ordinances, by stated calls to worship, and the *salutary influence of example*."

It is not religion which I am so unwise as to discuss at this time and place, but rather "*the salutary influence of example*" in our own noble profession of the law, whose obligations seem to me no less binding, whose purposes seem to me no less exalted, whose services no less lofty than those of the high priests of religion itself.

The voice which obtains justice for its fellows here on earth need hardly sink to silence before that which petitions for mercy in the world beyond. Each serves a use and neither a base or temporary one.

It has seemed to me that the highest earthly reward of a good man is to be recalled with love and veneration by his fellows; that the strongest incentive and the surest guide to excellence is found in the contemplation of the lives and behavior of those who, in the long test of time, have deserved and kept such love and veneration; who, being now but a little dust in an obscure grave, yet compel men to think deeply and feel nobly, even under strange skies in far lands and after years have laid low all who ever heard their voices or beheld their faces. Therefore I ask leave to take up the life and services of Sir Samuel Romilly, lawyer and law reformer.

Madame La Marquise de Montespan desired for her children, who bore the royal arms of France with a bar sinister, a governess. The poor widow of Scarron, the deformed poet, was chosen and installed in the royal palace. By and by the self-controlled, calm, religious governess attracted Louis the King. Then followed, after some years, the secret midnight marriage by the Archbishop of Paris, and Madame Scarron, as Madame de Maintenon, the unacknowledged queen of France, ruled for a generation. The Church party triumphed. The edict of Nantes for religious toleration was revoked. The persecutions which followed drove many

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<sup>1</sup> Annual address before the Bar Association of the State of Tennessee, delivered at Memphis, July 8, 1901.

of the best blood of France into exile, and among them was one, named Romilly, the son of a gentleman of good landed estate at Montpellier, in the south of France. The exile's youngest son Peter became a celebrated jeweller in London, and to him was born a son Samuel in 1757. The boy was placed with a great commercial firm, related to his family, and was designed for trade, but the death of the partners dissolved this partnership and so changed his purpose, and he returned home to act as an assistant to his father. He developed a talent for rhyme, which his people, as is often the case, hailed with undue applause. He took up Latin when 16 or 17, and read most of the prose writers of pure Latin, and many of the Greek writers in Latin translations. As he drew to manhood he received a considerable legacy from a rich relative. He had always disliked his father's business, and this legacy enabled him to enter himself as a student of law.

He first served as an articled clerk to Mr. Lally, one of the sworn clerks in chancery, for some years, but at 21 made up his mind to study for the bar and entered Gray's Inn. As he read, he formed a common-place book, which, even when he was in great practice making a fortune a year, he still found of great use to him. He did not join the debating societies then in high favor, but read and translated much ancient history with a view to form an elegant style, and adopted the expedient suggested by Quintilian "of expressing to himself in the best language he could whatever he had been reading, doing this, to economize time, while walking or riding in the crowded streets." The result was a style valued in its day, but to the present taste often over-elaborate and self-conscious, by no means terse, idiomatic, or virile.

He injured his health too by over-study, and seemed to have before him a brief, painful, wretched, and useless life. Just then there broke out the riots so vividly pictured in *Barnaby Rudge*, which had been excited by Lord George Gordon. The Inns of Court were marked for destruction, and Gray's Inn, where many Catholics were entered, was in especial danger. The barristers and students armed in their own defence, and poor young Romilly was up an entire night under arms and stood sentinel for hours at the gate in Holborn. These brief hardships of war still further reduced his shattered health. After months of suffering he had occasion to travel to Switzerland to return to his sister, then living there, her little child. It was a time of tumult, and the journey was made by a circuitous route by carriage through the Nether-

lands and Germany, travelling thirty to forty miles a day. The change of air and scene, however, restored in a great degree his health and spirits. He remained long in the mountain republic and saw much of the leaders of the popular cause, and thus early contracted a democratic sympathy which never left him. He even then sought to inform himself as to the criminal law and administration in the countries he visited, and at Geneva an interesting opportunity fell in his way. A burglary had been committed by a party of Savoyards, three were seized and three escaped. The proceedings were, as was usual on the continent, secret ; none but the prisoner, his counsel, and two friends named by him could attend. Romilly knew one of the counsel, who suggested to the prisoners (who were strangers) that Romilly be named to assist. An oath was exacted from him, sworn to before the syndic, that he would not give or suffer to be taken, copies of any papers in the cause, and that he would return to the court, immediately after the cause should be ended, all the copies or extracts which he might have made for his own use, and he was then allowed to participate. All his clients were convicted. One, a lad of sixteen, was sentenced to be whipped and then sent to serve twenty years in the galleys of France. One was sentenced to see his companion whipped and to be then exiled for life, and the third was merely banished. The three accomplices who had escaped were sentenced to be whipped in effigy, which sentence was executed by the carrying around the city of pictures of men being whipped, inscribed with their names. This is a quaint picture of criminal justice in perhaps the most enlightened city of a republic in 1781.

At Geneva Romilly formed a lifelong friendship for a young man named Dumont, of his own age, studying for the Church. Dumont was later the celebrated redacteur of Jeremy Bentham's works, as much identified with him as Boswell with Johnson, and far more honorably.

On his return young Romilly passed through Paris, which was celebrating the birth of the ill-starred Dauphin. "There were public illuminations too," he says, "but these were commanded, and I felt no small surprise when I read placarded in the corners of the streets the mandate by which the loyal people of Paris were ordered to shut up their shops and to illuminate their houses for three successive nights, and the officers of the police were enjoined to see the order executed." D'Alembert, whom he met, called his attention to the effect philosophy had produced on the minds of

**t**he people. He said he "was old enough to remember when such **a**n event had made the whole nation drunk with joy; but now **t**hey regarded with great indifference the birth of another master."

In 1783 Romilly was called to the bar and intended going the **c**ircuit, but the death of his brother-in-law in Switzerland required **h**is return to that country to bring back his sister and her children **t**o England. He went by way of Paris, where he was delighted to **m**eeet our own Dr. Franklin, and he says, "Of all the celebrated **p**ersons whom in my life I have chanced to see, Dr. Franklin, both from his appearance and his conversation, seemed to me the most remarkable. His venerable, patriarchal appearance, the simplicity of his manners and language, and the novelty of his observations, at least the novelty of them at that time to me, impressed me with an opinion of him as one of the most extraordinary men that ever existed. The American constitutions were then very recently published. I remember his reading us some passages out of them and expressing some surprise that the French government had permitted the publication of them in France."

Romilly's friend and companion, Baynes, has left a full account in his journal of this interesting interview, and tells how Franklin reprobated that maxim that all men are equally corrupt, and when Romilly said that was the favorite maxim of Lord North's administration, Franklin replied that such men might hold such opinions with some degree of reason, judging from themselves and the persons that they knew. "A man," added he, with his usual shrewd plain wit, "who has seen nothing but hospitals, must naturally have a poor opinion of the health of mankind."

On the young barrister's return he took up the practice and went the Midland circuit, and he described its leader, Sergeant Hill, as "a lawyer of very profound and extensive learning, but with a very small portion of judgment and without the faculty of making his great knowledge useful. On any subject which you consulted him he would pour forth the treasures of his legal science without order or discrimination. He seemed to be one of the order of lawyers of Lord Coke's time, and he was the last of that race. For modern law he had supreme contempt; and I have heard him observe that the greatest service that could be rendered the country would be to repeal all the statutes and burn all the reports which were of a later date than the revolution." It is pleasant to know that he was the last of his race.

Already Romilly was dreaming of reform and writing private memoranda upon it. He had employed as his personal servant, as



a matter of charity, the husband of his old nurse, a sickly Methodist shoemaker, of Puritanical appearance but intemperate habits, nicknamed by the bar "the Quaker," and this servant, being at least zealous for his master, and noting his slow advance in the profession, advised him most earnestly that "The business of barristers depends upon the good opinion of attorneys, and attorneys never could think well of any man who was troubling his head about reforming abuses when he ought to be profiting by them."

If any of us has the like opinion at present, he has the authority of "the Quaker" to back him; but if Romilly had taken his servant's advice, his name would not be on our lips to-day.

At this time, 1784, Count Mirabeau, already famous, came to England bringing a short tract which he had written against the order of the Cincinnati, lately established in America, which he wished translated into English. He read it to Romilly, and the latter being struck by and praising its eloquence, Mirabeau asked him to translate it. This Romilly undertook, and it was the foundation of an intimate and lasting acquaintance between the two men, and Romilly always believed that dissolute but splendid genius to have been truly desirous of doing good and animated by the noblest ambition, but marred by an excessive and unconquerable vanity.

So we see our young barrister already in touch with many public men of the Swiss Republic, with the venerable father of our constitutional convention, and with one of the most gifted and potent leaders of the French Revolution.

Romilly meeting John Wilkes and Mirabeau at dinner one day, says Wilkes defended the severity of the English criminal law and its frequent executions with much wit and good humor, but with very bad arguments, insisting that it accustomed men to contempt of death, though it never held out to them any very cruel spectacles; and he thought that much of the courage of Englishmen and of their humanity, too, might be traced to the nature of our capital punishments, and to their being so often exhibited to the people. Mirabeau, however, got the best of the argument, and declaimed against Wilkes's profound immorality until, with one less cool and indifferent to truth than Wilkes, it would have been followed by serious consequences.

Count Sarsfield wrote from Paris asking for some book giving the rules of order of the English House of Commons to assist the States General in regulating debates. No such book was in existence, and Romilly, with characteristic public spirit, prepared a



statement of the rules (as Jefferson did for our Congress). With Sir Gilbert Elliot's corrections they were sent to the Count, who died while translating them. They were, however, at once translated and published by Mirabeau, but the National Assembly paid no attention to them whatever. The confusion of that Assembly was so great that the secretary had often to suspend his Journal, and Dupont, one of the secretaries, told Romilly that it was once pleasantly proposed that they establish a rule that there should never be more than four members speaking at once. Romilly believed that a single rule requiring every motion to be in writing before put by the chair would have had a vast influence in preventing the confusion into which the Assembly constantly fell, and the utter failure under which it went down.

Mirabeau introduced Romilly to our American Benjamin Vaughn, and Vaughn made him known to Lord Lansdowne, who anxiously cultivated his friendship and acquaintance on account of a tract he had written, apropos of the recent trial of the Dean of St. Asaph's, which he called "A Fragment on the Constitutional Powers and Duties of Juries." This he sent anonymously to the constitutional society, which received it with great applause and ordered many copies published and distributed.

Lord Lansdowne became his valued friend and patron, and later offered him a seat in the Commons, which he declined. In the mean time the great Whig peer was most anxious for his professional advancement and that he should produce some work which might attract public notice. The Rev. Dr. Madan had just published his "Thoughts on Executive Justice," in which he insisted on the expediency of rigidly enforcing in every instance the sanguinary penalty of the law, which was still a code of blood, and vehemently censured the judges for their too lenient administration of the criminal law.

Ellenborough loudly insisted it was not true that Madan's tract had any effect, but Romilly shows that 51 persons were executed in London the year before its issue, 97 the year after, almost double the number, about 20 of them at once, and figures are more persuasive than declamation.

Lord Lansdowne was dazzled by Madan's reasoning, and recommended Romilly to write upon the same subject. He looked into the book, however, and was so shocked at the folly and inhumanity of it that, instead of enforcing it, he refuted it in "Observations on a Late Publication Entitled 'Thoughts on Executive Justice,'" adding a letter of Dr. Franklin. Lansdowne, Wilberforce, and a

few friends who knew its authorship, highly approved this little work, and Justice Willes praised it and wondered who wrote it.

Romilly for a time made the criminal law an especial study and attended criminal courts frequently, making notes on all the most notable things observed; chancery business, however, increased in London, and the circuit was gradually abandoned. In 1878 he visited Paris again, with many letters of introduction, particularly from Lord Lansdowne, saw the court in all its gayety, and met Lafayette and Thomas Jefferson, then American Minister. He visited the prisons and hospitals as well, and was shocked at what he saw there, and Mirabeau translated his remarks on them and also his refutation of Madan, publishing them as "*Lettre d'un Voyageur Anglais sur La Prison de Bicêtre.*" The police suppressed the work in Paris, but it appeared in London.

It is plain, I think, ere this, that Romilly was no indifferent spectator of wrong or suffering in the world, but brave and active in his efforts to mitigate them. Speaking with a friend of the Bishop of Durham on the suffering animals were made to endure, he thought great good might be done by bringing into use a mode of slaughtering attended with less pain, and he suggested rewards to butchers who practised such humaner method. Being pressed to write something he did so, and this being shown the Bishop, the latter took it up cordially, and later introduced himself to Romilly, and presently appointed him Chancellor of Durham.

He had grown gradually to be the barrister in largest practice in the court of chancery. And the Prince of Wales, who, as all heirs to the throne are apt to be, was in opposition, offered him a seat in Parliament, but it was instantly declined, lest it should impair his independence, he declaring his resolution, unless he held public office, never to come into Parliament but by a popular election or by paying the common price for his seat, which practice he defended.

In 1806 the Government of all the Talents was formed, and Charles James Fox notified Romilly that the latter was appointed Solicitor-General, and thus his public life began. The administration agreed to bring him into Parliament without expense. It was understood that the appointment was made at the Prince of Wales's request. Erskine was made Lord Chancellor, and called on Romilly, saying he should stand in great need of assistance, asking him what to read and how best to fit himself for his situation, saying, "You must make me a chancellor now, that I may afterwards make you one." Romilly was sworn in, kissed the

King's hand, and reluctantly submitted to the honor of knighthood, having used every influence to escape it, but the King was inflexible. Henceforth he was Sir Samuel.

Tall, graceful, of commanding figure and face which the canvas of Sir Thomas Lawrence still shows was of classical beauty, melancholy, earnest, disinterested; able in argument to expose a sophistry with destructive force, and with powers of sarcasm and irony which made men shrink, and yet with that turn for statistics and utilitarian facts which was then new in parliamentary oratory, he was from the first a great figure in the House. Three days after he was sworn he was asked on behalf of all the managers to sum up the evidence on the trial of Lord Melville, and the day before he performed this function, Mr. Fox, in an oft-quoted interview, told him he was not acquainted with his manner of speaking, but advised him not to be afraid of repeating observations which he thought material, as it was much better some should observe his repetition than that any should not understand him.

From the first he earnestly addressed himself to the amelioration of the criminal law, and to the correction of all brutalizing practices allowed by law, seeking to prevent the cruel and often fatal floggings in the Army and Navy, and to prohibit the slave trade, as well as to reduce the bloody severities of the general criminal law, and, though of so different a faith, seeking the enfranchisement of Roman Catholics. Cases constantly came to his knowledge which showed him the awful uncertainty and the wanton hardship of the criminal administration. For instance, the Lords of the Admiralty desired to have a poor printer prosecuted for libel because he had animadverted on the case of Thomas Wood tried by court-martial for mutiny and murder. The offence charged had occurred nine years before the time of trial, when the accused was but fourteen years old, only one witness identified him, and the prosecution must have fallen except that his defence consisted of a confession of guilt and a plea for mercy on the ground that he had, in extreme youth, joined the mutineers through fear of death. He was found guilty and sentenced to be hanged. His brother and sister (for condemned men may have kindred) heard of this, and insisted he was wholly innocent and not even present on the ship on which the mutiny occurred, but serving on different vessel in a different port. They got a certificate of this from the Navy Office and sent it on to Plymouth where it arrived before the execution. The guilt of the prisoner appeared so plain that no regard was paid to the certificate, and the man was hanged.

The Independent Whig spoke of this with great severity, and the prosecution for libel was demanded. The Attorney-General had no doubt as to the guilt of Wood, but thought it right to make some inquiry, when it transpired that he was perfectly innocent and at a remote point when the crime was committed. He had applied to another man to write his defence and had read it thinking it would excite compassion and be more likely to save him than a denial. The Attorney-General prevented the prosecution of the printer for libel, but he could not restore to life Thomas Wood, who had already been hanged by the neck until he was dead.

The prisoners confined in the King's Bench for debt asked Romilly to present their petition to Parliament for a revision of the law as to debtor and creditor, and he consented to do so. He supported Whitehead's bill for parochial schools, and met the argument that facility in obtaining knowledge would promote false notions in politics and religion by declaring that it proceeded on "the false supposition that if discussion were left free, error would be likely to prevail over truth."

It will be observed that all the above ideas which he advanced and supported have long since prevailed and become commonplace. He wrote Dumont that he desired to invest criminal courts with a power of making, to persons who shall have been accused of felonies and acquitted, a compensation to be paid out of the county rates, for the expenses they will have been put to, the loss of time they will have incurred, the imprisonment and the other evils they will have suffered, and to remove the severity of the law which had arisen from accidental circumstances, as in case of felonies made capital according to the value of the thing stolen, whereby through the depreciation of money, "as all the articles of life have been gradually for many years becoming dearer, the life of a man has in the contemplation of the legislature been growing cheaper and of less account." Sir James Scarlett advised him to seek to repeal all capital punishments for thefts unaccompanied by violence or circumstances of aggravation. This he much wished, but deemed a hopeless attempt.

Therefore he merely introduced a bill to repeal the act of Queen Elizabeth making it capital to steal privately from the person of another. In the debate the opponents insisted that it ought not to prevail, as pocket-picking was already on the increase, and many boys were tried for it. Sir Samuel well answered if the present law did not check but increased the crime, it was a strange

argument for its retention. He found the horror excited by the excesses of the French Revolution had resulted in making it almost impossible to effect the most reasonable reforms. He quotes as characteristic the speech of the young brother of a peer made to him in the Commons. "I am against your bill. I am for hanging all;" and when Romilly said he supposed he meant that certainty of punishment afforded the only prospect of suppressing crime, "No, no," said the young patrician, "it is not that. There is no good done by mercy. They only get worse. I would hang them all up at once." However, with slight amendment his bill to take away the death penalty for stealing privately from the person became a law, and the theft of a handkerchief from a pocket was no longer a hanging matter. He brought in a bill to relieve debtors in custody for not paying money or costs ordered paid in chancery. This, too, passed and became a law without opposition.

At this time Colonel Wardle moved for an address to the crown to remove the Duke of York from the command of the army, charging that royal personage with the corrupt disposal of commissions and promotions in the army. It was established that he had permitted a Mrs. Clark, his mistress, to interfere in these matters, that he had given commissions upon her recommendations and that she had sold her recommendations, and it was in evidence that the Duke knew of her unlawful traffic. The King and the Prince of Wales took the strongest interest for the Duke, and the administration sought to shield him, but Romilly bravely supported Colonel Wardle's motion. The great placemen among the lawyers in the House, including the Master of the Rolls, a high judicial officer, supported the Duke. Romilly and Henri Martin alone among the lawyers in the House, supported Colonel Wardle, but the bar outside was strongly with Colonel Wardle.

Romilly was told that by his course at this time he had lost his chance for the Lord Chancellorship, which, as leader of the chancery bar, he stood in close succession to. He said he was not quite sure of that, but was sure after the part he had taken that if raised to the Chancellorship "it will not be in expectation that I shall act in it otherwise than as an honest man." On motion of Perceval by a large majority the royal profligate was exonerated, but immediately thereafter resigned from the army, only to be shortly reappointed commander-in-chief.

The thanks of the Livery of London, the inhabitants of Westminster and Southwark, the freeholders of Middlesex, the corpo-

rations of Nottingham, Liverpool, Sheffield, and many of the great towns, were voted Romilly for his conduct in this matter.

Romilly from time to time moved for returns as to criminal convictions and executions and of persons transported for crime. In 1810 he brought in three bills to repeal statutes inflicting the penalty of death for the crimes of stealing privately in a shop goods of the value of five shillings, or forty shillings in a dwelling or on board a vessel in a navigable river. The Solicitor-General, with his usual panegyrics on the wisdom of the past and the danger of interfering with what is established, announced that he would oppose.

Though supported by Sir John Newport, Master of the Rolls, by Canning, and Wilberforce, Romilly was defeated in his motion for the repeal of the death penalty for forty shilling thefts in dwellings, but carried it as to privately stealing in shops; that as to stealing on vessels was postponed. Lord Holland took charge of the bill as to five shilling thefts in the Lords, but it was there rejected by thirty-one to eleven, among the inhuman majority there being seven prelates headed by the Archbishop of Canterbury, primate of all England.

Lord Ellenborough, always hard and wrong, spoke against it—Lord Erskine, whose eloquence sprang from a warm and humane heart, for it. The main argument was that innovations were dangerous, an argument still heard, and it was said that the House should consider that the author of this act had been the author two years before of an act to abolish the punishment of death for pocket-picking, and that the consequence had been a great increase of crime. Lord Lansdowne pointed out that all that was known was that prosecutions were more frequent than before, and this proved the efficacy not the failure of the amended law, the old deadly Code being simply unexecuted. Lord Ellenborough said there was no knowing where this was to stop, that he supposed the next thing would be to repeal the law which punishes with death the stealing to the amount of five shillings in a dwelling-house, no person being therein, and that act, he declared, afforded security to the poor cottager that he should enjoy the fruits of his labor; and he pathetically described the situation of the poor, relying with confidence on the security the law afforded them for the scanty comforts which they were allowed. He complained that the amendment punished the offence merely by transportation, which he described as only “a summer airing by an easy migration to a milder climate.”



In 1811 Romilly carried four bills to repeal statutes imposing the death penalty for petty thefts through the Commons against the government, but three of them were thrown out by the Lords under the lead of Ellenborough, the Chancellor, Lord Eldon, and Lord Redesdale, one only, as to stealing from bleaching grounds, was allowed to pass.

In 1812 Romilly moved to repeal the statute of Elizabeth which made it capital for soldiers or mariners to wander and beg without a pass, and this became a law. He supported a bill to abolish flogging in the army, it appearing that under this ghastly punishment men frequently died after great agony, but he had only seven members with him.<sup>1</sup>

Romilly had for some years sat in Parliament by virtue of a purchased seat for which he paid 3000 pounds, but now he was put forward for a popular election from the important city of Bristol, but after an exciting campaign he suffered a defeat. The Duke of Norfolk at once offered him a seat in Parliament from Arundel, with no expense save a dinner to the electors, and this was accepted.

In 1813 he moved to do away with death for stealing goods of the value of five shillings privately in a shop, warehouse, or stable; to do away with embowelling alive and quartering as punishments for high treason, and to take away corruption of blood for attainder of treason or felony. He carried the first in the Commons, but it was thrown out by the Lords, law lords and bishops being conspicuous in opposing it; and the other two bills were defeated in the Commons; but a year later, were, in modified form, carried, though to the last Lord Chancellor Eldon and Lord Ellenborough had tremendous doubts as to the safety of society if they should pass.

In 1815 he carried in the Commons a bill to make freehold estates liable for simple contract debts of the deceased owner, but the indefatigable Lord Ellenborough, the Lord Chancellor, and Lord Redesdale, with their faces turned to the past, said such dangerous innovations tended to destroy primogeniture, and the Lords threw it out. About the same time the enlightened Ellenborough succeeded in defeating a bill passed by the Commons to do away with the pillory, mainly on the ground of the antiquity of the punishment, saying it was mentioned by Fleta.

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<sup>1</sup> I observed with interest that the Romilly Society took steps a little over a year ago to oppose a bill in Parliament for the restoration of flogging as a punishment for certain crimes, and the measure was defeated.

When again in 1816 Romilly's bill to do away with death as the penalty for petty shoplifting was on its passage in the Commons, he stated to the House that a boy named George Barrett, only ten years of age, had been convicted of the offence at the Old Bailey and was then lying in Newgate under sentence of death. The bill passed the Commons, but was again defeated by the Lords under the lead of Ellenborough, as was the bill to subject freeholds to debts.

In 1818 Romilly was invited to contest Westminster, and accepting, was returned at the head of the poll and was received with enthusiasm by the people. His friend Jeremy Bentham came out in the campaign in a handbill against him on the ground that he was a lawyer, a Whig, and a friend only to moderate reform; but Sir Samuel nevertheless records a few days later a pleasant dinner at the great Utilitarian's, at which he met the American Minister, Mr. Brougham, and Mr. Mill.

Sir Samuel met, in 1796, at Bowood, Lord Lansdowne's country house, Anne Garbett, and a strong attachment immediately arose, and about a year later was followed by a most fortunate and happy marriage. In October, 1818, Lady Romilly died after an illness of some weeks, and three days later Sir Samuel, worn out with sleeplessness and grief, took his own life at his house in Russel Square, in the 62d year of his age. A contemporary London journal shows that the coroner's inquest found a verdict of temporary mental derangement. His death was regarded as a public calamity by persons of all parties, and Lord Eldon was moved even to tears.

Many years before Romilly had written the first of a series of letters on the reforms which he would attempt when Lord Chancellor, and the preparation he should make to justly fill that great office. Later, when by the integrity of his course he could no longer hope for office, he wrote, "Though it be now evident that I shall never be raised to any high office, yet I am resolved to conduct myself as if I knew that the highest dignity was my certain destination." He maintained a great and lucrative practice while serving as a laborious member of the House of Commons, sometimes receiving as much as 15,000 pounds a year, and was for many years the leader of the chancery bar.

He left a numerous family, and his son John raised himself to eminence at the bar, became like his father, Solicitor-General, later Attorney-General, and finally Master of the Rolls, and was advanced to the peerage as Baron Romilly in 1866, dying full of years and honor in 1874.



In despairing grief and tragedy Sir Samuel's gifted and high purposed life went out, but the fatal act of the stricken and deranged man could destroy his body but not the good he had already accomplished. One after another the reforms he strove for and did so much to promote have been accomplished, until the statutes of much of the civilized world are even more reluctant to take human life than Romilly sought to make the laws of England.

It was not until about three years ago that the Romilly Society was organized, having for its object the calm investigation of the condition of criminals, the prevention of wanton or useless hardships inflicted upon them, and the general amelioration of their condition. As Mr. C. H. Hopewood, K. C., Recorder of Liverpool, the Hon. Secretary of the Society, has stated, the name of Sir Samuel Romilly was adopted in the title of the Society because to him belongs the merit of being the most distinguished and the earliest of those who advocated a more merciful criminal law than that which previously existed.

That process of reforming and humanizing the criminal law has grown until few crimes are now capital among civilized people, except treason and wilful murder, which were the two offences which Jefferson, in the amended penal laws which he carried, left punishable by death. Sir Robert Peel and Lord John Russell, in Great Britain, as successive secretaries of state, about seventeen years after Sir Samuel's death, were able to make wholesale abolishment of the death penalty practically in all crimes except murder.<sup>1</sup>

Sir John Scott in a most interesting address, very recently given before the Liverpool Board of Legal Studies, entitled "British and European Criminal Law Compared," declares the British system probably sounder than any in the world. He points out that the tendency of the inquisitorial system of the continent is to think solely of the safety of the state and to sacrifice the individual, and such is the tendency in every country except England and America, while that of the English accusatory system, which is ours as well, is to surround the accused with safeguards and to consider his interests more than those of the community.<sup>2</sup> Sir John believes neither of these absolutely right, but after reading his account of conti-

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<sup>1</sup> Address of Sir Charles Cameron, Bart. and M. P., before Romilly Society, 1899.

<sup>2</sup> Montesquieu says: "In moderate governments where the life of the meanest subject is deemed precious, no man is stript of his honor or property but after a long inquiry; and no man is bereft of life, till his very country has attacked him, an attack that is never made without leaving him all possible means of making his defence." *The Spirit of Laws*, Book VI. ch. 2.

mental trials, where, as he says, there is no law of evidence, one sympathizes with Voltaire's blasting picture of a French Judge which Sir John quotes from the Philosophical Dictionary. "In the Dens of Chicanery," says that nervous writer, "the title of Grand Criminalist is given to a ruffian in a robe who knows how to catch the accused in a trap, who lies without scruple in order to find the truth, who bullies witnesses and forces them, without their knowing it, to testify against the accused . . . he sets aside all that can justify an unfortunate, he amplifies all that can increase his guilt; his report is not that of a judge, it is that of an enemy. He deserves to be hanged in the place of the citizen whom he causes to be hanged."

Sir John says: "A codification of Criminal Laws has been carried out in every country save England," and he sees no reason why it should not be carried out there. That the Indian Penal Code which was drafted by Lord Macaulay has proved an admirable success. "The penal codes which are applied in all the countries of continental Europe are an equal success."

By the courtesy of Gov. A. C. Botkin of the Commission to revise and codify the criminal and penal laws of the United States, I have just received the report of the commission, and I observe with interest that so far as I can ascertain in the absence of an index in the Code, the penalty of death attaches only to treason and murder in the first degree; and that piracy and offences under the anti-slave trade laws, casting away vessels, etc., which were punished by death under the earlier statutes, are to be no longer capital felonies.

The careful student of penology seems irresistibly driven to the conclusion that crime is best prevented and the public best protected by moderate punishment inflicted with certainty and promptness. The Hon. Sir J. C. Mathew, Judge of the Supreme Court of Judicature, in giving the annual address before the Romilly Society in 1900, was able to say, "that the diminution of sentences and the diminution of crimes have gone on together." General Curtiss, of New York, speaking in our House of Representatives in 1892, quoted statistics conclusively showing that the abolition of the death penalty, as moved by Romilly for certain offences, had materially reduced the number of persons charged with those crimes, but much increased the proportion of those charged who were convicted, justifying Sir Samuel's predictions.

The criminal laws of our own country and their administration in the matter of that chief crime homicide, afford the good citizen

little satisfaction. The statistics on this subject, compiled by the Chicago Tribune, seem to be thought as full and authentic as any, and are adopted largely in statistical works.

They show in about five years (up to Nov. 13, 1900) 39,874 homicides committed, and as they cover about a month and a half less than five years, we can call it 40,000 for five years, or an average of 8000 per year, which is appalling. They also show, however, a steady decrease in the number of homicides, there being 10,652 in 1896, and in 1900 (up to Nov. 13) 5637, a decrease of nearly one half in five years, which is deeply gratifying.<sup>1</sup>

In these five years in which there were, as we have seen, about 40,000 homicides, there were but 597 legal executions, about one homicide in 67 being followed by the death penalty legally inflicted. There were, however, in the same time, 632 deaths by lynching, just 35 more than by legal executions, so that about 2 homicides in 67, on an average, were punished by death inflicted either by law or by the mob.

These figures cannot be very satisfactory to men who shape, interpret, and administer the law. It is at least gratifying to note that the number of lynchings which nine years ago rose to 235 in a twelvemonth, has, contrary to popular belief, quite steadily decreased, having fallen in 1899 to 107 and up to Nov. 13 in 1900 to 101, a diminution of more than one half.

The prevalence of homicides, the fact that so few are legally punished and so many lawlessly avenged, certainly shows a grave defect which it lies with the legal profession to seek to reform. It is not easy to suggest a remedy, and the subject is often discussed with so much feeling as to embarrass reason. I have read many articles in legal publications considering it. It has been the subject of animadversion in foreign publications of the highest standing, as the *Juridical Review* of Edinburgh, and the *Revue des Deux Mondes* of Paris, and in our own publications as well; but while I gather very much by way of invective and denunciation, I find very little in the way of suggestion for improvement in most that has been written.

One writer, Mr. O. F. Hersey of the Maryland bar, advocates that lynching or aiding or abetting it be made a federal crime, so that the accused may be tried before a United States Judge and by a jury from the district instead of the county, and urges this

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<sup>1</sup> The total number of deaths by violence in the United States during the year 1901 was 7852, a decrease of 423 from the number of the preceding year.

on the ground that a local jury will never convict, and that the crime is of national importance. This would seem to require an amendment to the Federal Constitution to make it lawful, and the possibility of obtaining such amendment is so remote that the course seems hardly feasible whatever might be thought of it otherwise.

A writer in the *Yale Law Review*<sup>1</sup> believes that a great proportion of these lynchings, due to assaults on women, might be avoided if the injured person were not, in order to a legal conviction, compelled to testify publicly to the circumstances of the assault. That the injured person so abhors this that there can be no conviction, and hence a lawless execution follows as the only punishment possible. He suggests, and submits the draft of a law for it, the examination of the injured party and the taking of the testimony by way of deposition, the accused, the witness, and the counsel for each, alone attending before the officer, and he argues that this practice would be constitutional. If it avoids constitutional objections, it might be beneficial.

Mr. Charles J. Bonaparte of Baltimore, whose labors for many valuable reforms I appreciate, proposes in the *Yale Law Review*:<sup>2</sup>

1. To increase the number of capital crimes so as to insure the extirpation of the habitual criminal.

2. To diminish the delays and uncertainties of criminal procedure, thereby it would seem destroying many safeguards against unjust conviction.

3. To remove the pardoning power from the executive and vest it in judicial officers.

His third suggestion seems to have value in it, but the second seems by no means free from danger, and it is submitted that the first is not in agreement with the tendency of modern feeling or legislation, and that there is nothing in the history of penology to support it. Laws like those of Illinois making kidnapping a capital offence, induced by the hysteria following the abduction of young Cudahy, hardly seems wise. The newspapers of a few days ago report a flagrant case of kidnapping in Illinois, and it is submitted that an Illinois child is no safer than his neighbor across the line. A bloodier code as a means to reduce crime has always been a failure in point of fact, as history very fully shows.

A lurid, tragic, and awful punishment so accents the crime for which it is imposed, that I venture to believe that it operates often

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<sup>1</sup> Vol. 7, p. 20.

<sup>2</sup> For May, 1899.

to promote instead of to prevent its repetition. The excited reflection upon a shocking act by many thousands of persons, including numbers of low intelligence and morale, and of morbid disposition, operates as a dangerous hypnotic suggestion to the same crime.

“ Between the acting of a dreadful thing  
And the first motion, all the interim is  
Like a phantasma or a hideous dream.”

According to the old fable, ostriches hatched their eggs by looking at them, and many a brood of crime has certainly been hatched by contemplation. If the criminal, after a prompt and efficient but just trial, disappears quietly in a life of confinement and enforced labor, the effect is far more wholesome, far less morbid. Therefore I would, with deference, suggest milder rather than harsher penalties.

In the matter of homicides, General Curtiss in 1892 quoted a letter from the editor of the Chicago Tribune (whose statistics I have alluded to) to the effect that the states showing the fewest murders in proportion to population, are Maine, Rhode Island, Vermont, Michigan, Minnesota, and Wisconsin. Four of the six have for many years excluded death from the punishments of their criminal code. Quite recently Colorado has abolished the death penalty, and it will be of interest to note whether a comparatively new and sparsely settled state can do so with good effect. Certainly no increase of lynching seems to be noted in states abolishing the hangman.

Harper's Weekly in 1897 contrasted the records for six years of various states in the matter of lynching, and showed two states which had each seven capital crimes upon its statute books, had to report, one 104, and the other 116 lynchings, while Michigan, with no capital punishment, had but 3. Wisconsin, with no capital punishment so far as I can learn, had but one, which followed a very atrocious murder. That lynching was followed by a prosecution of seven of the lynchers, but the jury acquitted them promptly on the ground of insanity.

I only suggest that the standards of humanity are largely affected by those of law, and that men's feelings shape themselves largely to the regulations of statutes; that moderation and all reasonable humanity in the punishment of crime lessens crime in the best way by improving the hearts of men; and that an opposite course increases it by hardening men's hearts. “ Experience shows,” says Montesquieu, “ that in countries remarkable for the

lenity of their laws, the spirit of the inhabitants is as much affected by the slight penalties, as in other countries by severer punishments."

The solving of these difficulties lies largely with our profession, and I have spoken of them not because they are easy, but because they are hard, not because I know exactly how they can be met, but because I believe Romilly afforded us an example of a great lawyer who sought to meet and solve such questions to the best of his ability, and because the three generations that have passed since his death have tended to confirm rather than to confute his theories of law reform.

Perhaps it was because he was a lawyer and a friend only to moderate reform, as Bentham complained, that he achieved so much and laid the foundation for so much more in the line of lasting, steadily growing improvement.

The value of Bentham's writings cannot be doubted, nor their world-wide effect, by indirection, on legislation. Romilly himself was his earnest but not servile disciple. I had the pleasure of speaking of Bentham's services to the bar of Virginia at a recent meeting, but so far as I can learn, no measure drafted by Bentham ever passed directly into the statutes, whereas numbers of those proposed by Romilly had that good fortune.

I am confident that questions of legal and administrative reform are largely for men of our cloth, and I feel with Romilly that "all the greatest reforms in human affairs have been brought about by steady perseverance in the doing of old established impossibilities." When he sought to do away with the penalty of death for a theft of five shillings' worth of goods from a shop, Lord Eldon declared, "If the present bill be carried into effect, then may your Lordships expect to see the whole frame of our common law invaded and broken in upon."

My only answer is, if it is defective, ineffective, or unjust, why should it not be broken in upon? Why should the worse stand when the better can be substituted? It has been and is the reproach of many of our profession in high place that they have devoted ability and influence to a stubborn resistance to all reform, instead of to guiding it and making it wise and efficient.

When Sir William Scott, afterwards Lord Stowell, Lord Eldon's brother, opposed the measures which were proposed for doing away the evils of the ecclesiastical courts in England, Romilly turned to him in the debate and splendidly exhorted him not to oppose, but as the best qualified lawyer in England, to draft and



carry the needed amendments, and, many others joining in the request, Sir William at last complied.

I will ask your indulgence if I confess that after nearly thirty years at the bar and after some small share of victories before the courts, the service that I look back to with the most satisfaction is in a matter of legislation. If I may speak of a personal matter, I happened to hear Sir Henry James, now Lord James of Hereford, and Sir Farrar Herschel, later Lord Herschel, advocate the passage of the English Corrupt Practices Act in the Commons, and so instigated, later drafted and presented a bill for kindred enactments as to corruption in elections to the legislature of my own state. After years of discussion and more than one failure, and after others had done more for it than I could do, I finally had the satisfaction of seeing that measure become in great part a law.

Now when I observe the United States senators, governors, and other great officers (and humbler men as well) making sworn returns of the cost of their candidacy and election under this law, and see these returns published and commented on by the press, I feel that there has been introduced a practice tending to probity in public affairs, affecting already some two millions of people, and when, after a bitter attack in the last legislature, I saw the law retained, I ventured to hope for the salutary law perpetuity except as it may be made stronger and not weaker in years to come.

I have never felt it right to smother the voice of protest against wrong. A friend recently told me that he witnessed an incident in a medical school in Vienna which illustrates a typical method of suppressing complaint, which, I submit, ought not to prevail. An anatomist was performing a bloody demonstration upon a living dog which had been chloroformed, and, like the old English traitor, was embowelled before death. The anæsthetic proved inadequate, and there was heard a rising note of agony from the poor beast, so pitiful that a murmur of protest arose even from the accustomed company of medical students. The moans of the dog presently ceased, and as the lecture ended some one said to the assistant, "You gave the dog some more chloroform, did n't you?" "Oh no," was the answer, — "just cut his vocal cords." That is some men's idea of righting a wrong in a community, simply cut the vocal cords, browbeat and destroy those who complain, and declare that "order reigns in Warsaw."

I trust that the bar will oppose its potent voice to this deadly policy and will aid a wronged class or community as it aids the wronged individual to a hearing and to just relief.

Surely the spirit of Romilly which looks forward is better than that of Ellenborough which looks back, and it is better to save a child of ten from hanging for a theft of five shillings than to preserve the inestimable boon of the pillory, because Fleta mentions it.

I congratulate the bar that this better spirit has dominated the commission which has revised our federal criminal code. I hope under the controlling influence of our liberal profession it may animate and direct the revision of the statutes constantly occurring in our several states, until no one who is punished can reproach with injustice the law itself or the judge and the lawyer who are its ministers.

I hope we may travel toward a golden age, and not, as some have taught, away from it; and in that unending journey toward justice, humanity, and tranquillity, I hope the gentlemen of the bar may march first and not lag last. Many a one of them, I hope, may emulate the noble spirit of Sir Samuel Romilly and choose great service rather than high office, a memory which brightens at a century's close rather than one that fades with the dissolving flesh of him that made it.

The good work is not all done, and the great spirits are not all quenched. When the elder Pitt spoke for the last time, and Edmund Burke for the first time, in the House of Commons, Macaulay calls it "a splendid sunset and a splendid dawn," and as in nature we see this succession of days that in glory die giving way only to days that in glory are born, so a larger vision may view the succession of high souls and services, leading up the progress of mankind like the dawns and the sunsets, the one kindling the other, encircling the earth with a girdle of light immortal and ever shining.

"We cannot . . . look into the seeds of time  
And say which grain will grow and which will not;" —

but the use of history is to discover the course in the currents and tides of time and civilization, and the plain duty of enlightened men is then to aid and not to obstruct, to move with and not vainly seek to row against the beneficent progression.

Romilly's life, despite its tragedy, was crowned with the benedictions of mankind; his sons continued his name and service in honor and distinction, three of them serving in Parliament, and now many of the foremost lawyers and judges of England are associated under his revered name in carrying on the good works he so bravely began. So that his name remains a perpetual foun-



tain of inspiration to those good works which belong essentially to the man of law, and which are within the competence of our profession.

Law will grow more and more humane and lenient; that has been its unbroken course for generations. The Romillys rather than the Eldons and Ellenboroughs will be in sympathy with the after generations; and the lesson of policy no less than duty calls us to move with that great world-wide tide of progress which knows no receding.

“ Like to the Pontic Sea  
Whose icy current and compulsive course  
Ne'er feels returning ebb, but keeps due on  
To the Propontine and the Hellespont.”

At the first Christmas time after Romilly's death, Benjamin Constant pronounced his eulogy at the Athénée Royal, in Paris, and spoke of him as “*d'un étranger illustré qui appartient à tous les pays, parce qu'il a bien mérité de tous les pays, en défendant la cause de l'humanité, de la liberté, et de la justice.*”

May we recall only to emulate this illustrious stranger who has brought such high and lasting honor to our common profession.

In this matter of justice, the world in its need turns to the bar, saying, like the leper of old, “If thou wilt, thou canst make me clean,” and the highest service of the bar is to answer that cry. It can be best answered, moreover, not under the promptings of prejudice or passion, but under “the salutary influence of example” set by such noble leaders of the bar as Sir Samuel Romilly, who made the past a teacher, not a master, and the future a hope and achievement rather than a dread and despair.

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## THE RIPPER CASES.

THE General Assembly of Pennsylvania passed an act March 7, 1901, entitled "An Act for the government of cities of the second class." It was restricted by its terms to existing cities of that class, three in number. The act abolished the office of mayor in such cities, and created the office of recorder in its place. It provided for the appointment of the three recorders by the governor, to hold office until after the next usual election provided by law, and until the following election in 1903, thus passing over an election and depriving the electors of an opportunity to elect their own chief executive officers respectively, in these three cities.

Article 3, section 7, of the constitution states: "The general assembly shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, boroughs, or school districts . . . incorporating cities, towns, or villages, or changing their charters, . . . creating offices, or prescribing the powers and duties of offices in counties, cities, boroughs, townships, election or school districts." Yet on *quo warranto* the court of common pleas affirmed the validity of the above act, and the judgment was affirmed upon appeal to the Supreme Court.<sup>1</sup> Mitchell, J., delivered the opinion of the four judges constituting the majority; and Dean, J., delivered the dissenting opinion, in which McCollum, C. J., and Mestrezat, J., concurred.<sup>2</sup>

The court decided that the act was constitutional, or rather, it decided that it could not declare the act to be unconstitutional, principally for the following reasons:—

It is not void on the ground of impossibility of execution.

The constitutionality of the classification of cities having already been upheld, it is for the legislature and not for the court to determine what differences of system shall be prescribed for differences of situation.

<sup>1</sup> Commonwealth *ex rel.* Elkin, Atty.-Gen. *v.* Moir, 49 Atl. Rep. 351, May 27, 1901.

<sup>2</sup> The Philadelphia Press for October 15, 1901, gives in full what it alleges was the talk over the telephone between Judge Potter of the Supreme Court and Governor Stone, the governor of the state, about the first of May last, which it also published in its issue of May 2. It alleged that the judge then told the governor what the decision was going to be, and what members of the court would dissent. This has been denied by both, but no action for libel has been brought against the Press. It is to be noted that this alleged telephone talk was published May 2, and the opinion was delivered May 27.

The making the recorder an appointive, instead of an elective officer, is a part of the temporary adjustment provided in the schedule to bring about the change made by the act, and is not unconstitutional.

The act is not local because the power to appoint a recorder is confined to existing cities, nor is it unconstitutional because the recorders appointed under the act are to hold office until 1903, thus passing over an election and depriving the citizens of an opportunity to elect their own executive officer.

Nor is it unconstitutional because it vests in the governor the discretion of determining when it shall become operative by the appointment of the recorders ; nor because it removes an elective officer, the mayor, from office during the term for which he was elected, by a mere change in the name of the office ; nor because it authorizes the governor to remove an elected officer without cause ; nor is it local and special legislation, and therefore opposed to sec. 7, art. 3, of the constitution, because limited to three existing cities ; nor, finally, is it unconstitutional because it violates the spirit of the constitution in those provisions and that general intent which preserves to the people the right to local self-government.

It is submitted, however, that the act in question is plainly a special or local law, regulating the affairs of three existing cities only, and changing their charters ; it creates offices, and prescribes the powers and duties of office in those cities, and is in direct and plain violation of said art. 3, sec. 7, of the constitution.

According to the law as laid down in this case, no town or city has any rights the legislature is bound to respect, and there is no right to local self-government. Individually any citizen may claim the protection of the court against the arbitrary exercise of power depriving him of his legal rights, even though it be attempted by the legislature. Collectively, however, the body of citizens aggregated into a town or city, is beyond the pale of law, and the judiciary is powerless to protect it against whatever the legislature may do. "*Sic volo sic jubeo*," that is all the sovereign authority need say, is the astounding doctrine in *Philadelphia v. Fox*,<sup>1</sup> in an opinion affirmed in the case now under review. The majority of the court affirmed the assumption that the town is purely the creature of the state and is subject to its will, in the absence of any constitutional inhibition.

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<sup>1</sup> 64 Penn. St. 169, at 180 (1870).

It is most strenuously submitted that this doctrine is fundamentally unsound, and that it will lead to most mischievous results if it becomes generally accepted. It has been persistently maintained not only in Pennsylvania but also in the Supreme Court of the United States.<sup>1</sup> It has also been maintained in other states<sup>2</sup> and in other cases cited and examined in the articles on "The Right to Local Self-Government,"<sup>3</sup> so that there is danger of its general acceptance as correct. An examination of these cases will show that in most if not all of them the affirmance of such a general doctrine is merely *dictum*, it not being necessary to the decision of the case actually before the court. It is a dangerous doctrine — one, under color of which politicians, legislators, ignorant of constitutional law, even if no worse be said of them, and judges, accepting it without adequate study of the history and development of the American colonies, are unconsciously coöperating to deprive our towns and cities or other units of our political system of their right to self-government in their local affairs.

Thus, in many of the last cited cases the right to local self-government is denied where the question was only as to the validity of the appointment by the governor of a board of state police over cities. In such a case it may well be held that although these officers perform their functions in a particular locality, yet the functions themselves are state functions, and hence the officers are state officers.<sup>4</sup> As these cases should rest on this ground, it is clearly only *dictum*, and outside of the case, to go on and to declare there is no right to local self-government. Yet that is what these cases do. It is also unfortunate that these cases arose when the right to local self-government was not so well understood as it now is, and also, that they arose and were decided in states where this right has never been prominently asserted, properly understood, nor incorporated into the very fibre of their being, as was the case in the New England settlements.

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<sup>1</sup> United States *v.* Railroad Co., 17 Wall. 322 (1872); Barnes *v.* Dist. of Columbia, 91 U. S. 540 (1875); Laramie Co. *v.* Albany Co., 92 U. S. 307 (1875); Mount Pleasant *v.* Beckwith, 100 U. S. 514 (1879); Merewether *v.* Garrett, 102 U. S. 472 (1880); Met. R. Co. *v.* Dist. of Columbia, 132 U. S. 1 (1889).

<sup>2</sup> People *v.* Draper, 25 Barb. 344 (1857); Mayor of Baltimore *v.* State Bd. of Police, 15 Md. 376 (1859); State *v.* Covington, 29 Ohio St. 102 (1876); Burch *v.* Hardwicke, 30 Gratt. 24 (1878); Coyle *v.* McIntire, 7 Houst. (Del.) 44 (1884); State *v.* Smith, 44 Ohio St. 348 (1886); State *v.* Hunter, 38 Kan. 578 (1888).

<sup>3</sup> 13 and 14 HARVARD LAW REVIEW.

<sup>4</sup> 2 Dillon, Mun. Corps., § 773; Burch *v.* Hardwicke, 30 Gratt. 24, at 38, and many other of the above cases.

It is further to be noted that legislatures are prompted to interfere with local self-government whenever the dominant political machine of whatever party is losing its control in the particular city sought thus to be brought into subjection. The attempt is always accompanied with vehement protestations that the proposed legislation is in the interests of a sound morality, the inhabitants of the particular city having shown themselves to be incompetent to manage their own affairs. Experience has yet to show, however, that this substitution of a system of paternalism, of government by an outside body, the essence of the Roman system of the government of colonies by prefects, has made matters better, except temporarily. It is, of course, an entire denial of the essential principle of American government, that ours is a government of the people by the people, and that the best and American way for men to learn how to carry on our government is through their own self-government in local affairs.

But the constant repetition of a *dictum*, especially if it be unchallenged and repeatedly acted on and accepted as a correct statement of the law, fixes it finally too often as law, and thus what passes for law becomes accepted as law.

“And I am tempted to take this opportunity of observing, that a large portion of that legal opinion which has passed current for law, falls within the description of ‘law taken for granted.’ If a statistical table of legal propositions should be drawn out, and the first column headed ‘Law by Statute,’ and the second, ‘Law by Decision;’ a third column under the heading of ‘Law taken for granted’ would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine, — the mere repetition of the *cantilena* of lawyers, cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle.”<sup>1</sup>

“I perfectly well remember, not indeed in a Court of Error, but at the time when my noble and learned friend on the woolsack was presiding with so much dignity, and so beneficially to the public, in the Court of Exchequer, a case was brought before that court, upon which it was proposed to overrule, not the *dicta*, the impressions, the fancies of the learned frequenters of Westminster Hall, but decided cases, running through a period of near 50 years, appearing in numerous reports, and laid down by all the text-writers. I believe Mr. Justice Bayley, on a particular examination of those cases, thought them clearly founded in error; they

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<sup>1</sup> By Lord Denman in *O'Connell v. the Queen*, 11 Cl. & Fin. 155, at 372, 373.

were traced to a *dictum* uttered by Lord Mansfield in his first judicial year, which *dictum* was held by Mr. Justice Bayley to be untenable; and my noble and learned friend pronounced the unanimous judgment of his Court, denying the authority of these cases, and overruling them all. I speak of the case of *Hutton v. Balme*, 2 Younge & J. 101; 2 Cr. & J. 19; 2 Tyrr. 17; and on Error, 1 Cr. & Mee. 262; 2 Tyrr. 620; 3 Moo. & S. 1; 9 Bing. 471. The same question, in another case, came afterwards upon a writ of error, before your Lordships' House (see *Garland v. Carlisle*, 4 Cl. & Fin. 693) and your Lordships thought that you were bound by the authorities, although the principle might not be perfectly clear. But that did not prevent my noble and learned friend and the Court of Exchequer from entering into a full consideration of the question, whether in point of principle, those cases were good law, or whether they ought not to be rejected if proved to be founded on mistake; nor did any one impugn their right and their duty to examine in that way, any legal proposition."<sup>1</sup>

All the *dicta* of all the judges in the United States to the effect that towns are only creatures of the state, and are subject to its uncontrolled and uncontrollable will, need not deter us therefore from an examination of this subject and from coming to a very different conclusion, if the law and the facts lead us thereto.

In the case under examination, as in the previous cases in Pennsylvania, the court made no examination of the early history and development of the state. Had it done so it would have found that before Penn's charter was granted in 1681, many settlements had been made within the limits of Penn's territory and had organized themselves as towns under town government. As elsewhere in the American colonies, local self-government was self-instituted and was not the gift of any legislature. The Duke of York, afterwards James II., then ruled over what is now New York, Pennsylvania, Delaware, and part of New Jersey. "The Book of Lawes" was in force from 16 Chas. II., 1676, and it distinctly recognized, as then already existing, the English system of towns with powers of local self-government.<sup>2</sup>

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<sup>1</sup> By Lord Denman in *O'Connell v. The Queen*, 11 Cl. & Fin. 155, at 368, 369.

<sup>2</sup> The most cursory examination of these laws show this. Thus, p. 39, edition of 1879, every town shall be provided with a powder magazine; p. 34, a justice of the peace may preside at any town meeting in his town; p. 33, warrants are to be issued to the constables of the several towns to summon jurymen; p. 29, any horse, mare, cow, ox, or bull, though marked, shall, if sold, be registered anew in the town sold into; p. 22, constables shall be chosen in all towns yearly by the plurality of the freeholders in each town; p. 15, fence viewers are to be appointed in each town annually by the town's constable and overseers; p. 49, every one shall pay their rate to the constable of the town and all town rates shall be made in the same manner and by the same rule as the county rate; p. 50, plainly recognizing the right to local self-



The law did not create these towns and town officers nor did it create the powers and duties of towns, townsmen, and town officers. The settlers brought a knowledge of all these things with them and organized themselves as towns which the legislatures afterwards recognized and regulated. But a power to regulate, especially upon request, is very different from a power to destroy and especially without or against request. So the early laws of all the American colonists recognized and regulated, but did not create, our system of trial by jury. In both cases the right is fundamental and institutional. The legislature regulated the exercise of each right, but it neither created nor can it destroy either right — the right to jury trial and the right to local self-government.

Our constitutions were framed under an existing state of facts and with a view to those facts. The right to local self-government and the then existing system of town, city, or county government as the unit or basis of our political system of government were facts when these constitutions were adopted. Therefore no express recognition of them was necessary to their continued existence, but they continued unless expressly put an end to by these constitutions. As they did not do this, these rights continued and continue now.<sup>1</sup>

Now however comes the untenable doctrine that as the legislature has the power to supervise and regulate the exercise of town powers, it has also the power to annihilate them.

It is true that the system of government inaugurated under Penn's charter did away with much of this earlier system, and the county became the unit of political power. Still enough is left to

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government: "Whereas in perticuler Townes many things do arise, which concerne only themselves, and the well Ordering their Affairs, as the disposing, Planting, Building and the like, of their owne Lands and woods, granting of Lotts, Election of Officers, Assessing of Rates, with many other matters of a prudentiall Nature, tending to the Peace and good Government of the Respective Townes, the Constable by and with the Consent of five at least of the Overseers for the time being, have power to Ordaine such or so many peculier Constitutions as are Necessary to the welfare and Improvement of their Towne: Provided they bee not of a Crimminall Nature, And that the Penalties Exceed not twenty Shillings for one Offence and that they be not Repugnant to the publique Lawes: And if any Inhabitant shall neglect or refuse to observe them The Constable and Overseers shall have power to Levie such fines by distress." P. 44, "Overseers shall be eight in Number, men of good fame, and life, Chosen by the plurality of voyces of the freeholders in each Town . . . ." P. 51, "All votes in the private affaires of Particular Townes shall be given and Determined by the Inhabitants, freeholders, Householders" . . . &c.

<sup>1</sup> See the dissenting opinion of Brown, J., in *People v. Draper*, 15 N. Y. 556, now generally considered the more correct exposition of the law on this subject.

show us that in this colony, as in every other English colony in America, the right to local self-government, through town, city, or county, was recognized as fundamental and a part of our political institutions. Therefore it was not a gift by the legislature. This is in accord with Magna Charta.<sup>1</sup> That this right did not receive distinct recognition in any Bill of Rights was because no one questioned its existence or thought of its possible loss. In the minds of all students of constitutional rights, as in the mind of Webster, lay the conception of "the government of a great nation over a vastly extended portion of the surface of the earth, by means of local institutions for local purposes, and general institutions for general purposes."<sup>2</sup>

The decision under review violates the sound principle that a constitution is not to receive a technical construction, like a common law instrument or statute. It is to be interpreted so as to carry out the great principles of the government, not to defeat them.<sup>3</sup>

"It is the duty of the courts to enforce the constitution as they find it. Attempts in covert modes to defeat its plain provisions must be set aside with the same certainty as when the methods are open. Even if the intention be innocent and yet the legislation comes within the constitutional prohibition, it must not be tolerated."<sup>4</sup>

The same court in the same state, but now differently constituted, no longer deems it necessary to follow this salutary principle.

An adroit way to elude a question and to decide against it, is to set up a false and incorrect statement of your antagonist's claim, and then, proceeding with overwhelming reasons against it, to decide the case against him, by thus sinking out of sight the true principle upon which the case should have been decided in his favor. Thus in the case under review, the opinion maintains that the court is asked to hold that a law, although not prohibited by the constitution, is void, if it violates the spirit of our institutions or impairs any rights which it is the object of a free government to protect.

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<sup>1</sup> Sec. 16. "And the city of London shall have all its ancient liberties and its free customs, as well by land as by water. Furthermore we will and grant that all other Cities, Burghs, and Towns and Ports should have all their liberties and free customs."

<sup>2</sup> Speech of December 22, 1843, on "The Landing at Plymouth." <sup>3</sup> Works of Daniel Webster 207.

<sup>4</sup> Commonwealth v. Zehon, 8 W. & S. (Pa.) 386.

<sup>5</sup> Scranton School District's Appeal, 113 Penn. 176.



Having set up this bogey it is easy for the opinion to proceed to demolish it, which it does with a good show of learning and citation of undoubted authorities. Even the brief for the defendant and the learned address by Richard C. Dale, Esq., of counsel for the appellee, read in August, 1901, before the American Bar Association, on "Implied Limitations upon the Exercise of the Legislative Power,"<sup>1</sup> is not free from this objectionable method of treatment.

The majority of the court could not find any unconstitutionality in the act in question of March 7, 1901, although the so-called temporary appointment of the three recorders for Pittsburg, Allegheny, and Scranton frustrates the admitted right of the voters of these cities to elect their own recorders at the next election provided by law, inasmuch as these "temporary" recorders are to remain in office until the election in 1903. Nor could they find any unconstitutionality in the act, although it provides for such "temporary" appointments in "existing cities" only, thus cutting out any cities that may subsequently become cities of the second class, through increase of population. Plainly the act was entitled "An Act for the government of cities of the second class" in order that it might not conflict with the provisions of the constitution, article 3, section 7, already cited, but obviously the restriction of its operation to existing cities only leaves it open to the objection that it is in fact a special law regulating the affairs of the three cities now constituting the second class, and also that it creates office and prescribes the powers and duties of the office created (recorder) in three cities, and is therefore unconstitutional and void.<sup>2</sup> If this be not so, the language in question can have no meaning the court is bound to follow.

In spite of the plain language of this constitution the supreme court of this state long ago upheld an act of the legislature dividing cities into classes.<sup>3</sup> This was the first step of the political machine to circumvent the provisions of the new constitution. A ready means being furnished by this decision for evading its plain terms, by gradually increasing the number of classes, as the purposes of the politicians might require, the general assembly proceeded to divide the cities of the state into five classes and subsequently into seven classes. "The law opened the gate and we

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<sup>1</sup> See 40 Am. L. Reg. N. S. 580; 9 Am. Lawyer 432.

<sup>2</sup> See the series of articles, "Special Legislation in Pennsylvania," by Thomas R. White, 40 Am. L. Reg. N. S. 623.

<sup>3</sup> *Wheeler v. City of Philadelphia*, 77 Pa. 338.

were time and again confronted by acts, which, under the guise of general legislation, sought to evade the inhibitions of article 3."<sup>1</sup> By this time the court had become satisfied that abuse was being perpetrated under color of its decision in *Wheeler v. City of Philadelphia*. It proceeded to limit its application by its decisions in *Scowden's Appeal*<sup>2</sup> and in *Ayar's Appeal*,<sup>3</sup> saying,<sup>4</sup> "It was never intended to license indiscriminate classification as a mere pretext for the enactment of laws essentially local or special."

In the same way it will be impossible for the judiciary to follow to its legitimate and logical conclusions the principle affirmed in the case under review. As the dissent says:<sup>5</sup>

"Factional politics and partisan politics are not troubled by scruples. Under the principle of this decision, there is nothing to hinder a hostile partisan majority in the legislature from ousting the party in power in Philadelphia, a city of the first class, and placing its government in possession of the minority."

Worse even than this, if courts are to shut their eyes to what our legislators are openly doing, and if the right to local self-government is to be ignored and denied, there is nothing to hinder a hostile partisan majority in the legislature from abolishing the office of treasurer in all the towns and cities in the state, directing that the contents of all their treasuries be handed over to a new officer to be appointed by the governor, who, under the direction of the political machine, may be the very man behind the throne to whom the governor is indebted for his office and for whom the penal law has no terror.

"It requires but a glance at the act to see that it is an attempt to evade the constitution. It is special legislation under the attempted disguise of a general law. Of all forms of special legislation, this is the most vicious."<sup>6</sup>

The dissent is placed "upon the strong ground that it" (the statute in question) "is local and special legislation under the guise of a general law. Therefore it is in direct violation of section 7, article 3."<sup>7</sup>

"It is purely a question of law whether section 7 of the constitution has been violated, yet we, in effect, say it is the province of the legislature to decide the question, and that we will not inquire into it."<sup>8</sup>

<sup>1</sup> See the dissenting opinion in the case under review, 49 Atl. Rep. 360.

<sup>2</sup> 96 Pa. 422.

<sup>3</sup> 122 Pa. 266.

<sup>4</sup> P. 279.

<sup>5</sup> P. 360.

<sup>6</sup> By Paxson, J., in *Scowden's Appeal*, 96 Pa. 422, at 425.

<sup>7</sup> 49 Atl. Rep. 361.

<sup>8</sup> 49 Atl. Rep. 360.

And the dissent well concludes :—

“ I fear the time is not far distant when the pernicious results of our decision will either bring about a constitutional enactment to remedy the mischief, or move us to overrule it.”

The decision is plainly erroneous, because the act in question violates the express provisions of the constitution of the state, and also because, even if the constitution were silent on the subject, it ignores the right to local self-government, one of the fundamental rights in every American state. It is another step on the downward path leading to the loss of one of our dearest and most valued legal, as well as political, rights—the right to local self-government.

*Amasa M. Eaton.*

PROVIDENCE, R. I.

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JUDICIAL RESTRAINTS UPON TRADE COMPETITION. — A decision of the supreme court of Alabama is instructive in its relation to the question of unfair competition. The plaintiff, a water company, filed a bill against the city of Mobile, a corporation operating a system of waterworks and sewers for itself and its inhabitants. The bill alleged that the defendant unjustly discriminated against the patrons of the plaintiff by charging them the same price for sewerage service alone, that it charged the public for water and sewerage service together, thereby causing the patrons of the plaintiff to discontinue taking the plaintiff's water. The bill prayed for an injunction against such discrimination in the future, and the decree of the lower court granting an injunction was affirmed upon appeal. *City of Mobile v. Bienville Water Supply Co.*, 30 So. Rep. 445. The interesting feature of the case is that the injunction was obtained not by a person discriminated against, but by a rival company which by reason of the discrimination was threatened with the loss of its business. The case therefore stands for the proposition that a corporation engaged in a public employment may not build up its own business by discriminating against persons trading with a rival, and a rival damaged by such action may have it enjoined although not itself the direct victim of the discrimination.

The dividing line between fair and unfair competition has never been clearly indicated and it is impossible to mark it off with anything like precision. An early case decided that an action lay against a rival who injured the plaintiff's business by the intimidation of his prospective patrons. *Tarleton v. M'Gawley*, Peake 205. The trade union cases are every day illustrations of the doctrine that violence actual or threatened against persons trading with or employed by the plaintiff is a legal injury to him if resulting in damage to his business. The trade mark and trade

name cases show that the deceiving of the public by the counterfeiting or simulation of the plaintiff's goods resulting in his damage may be enjoined by him. *Reddaway v. Banham*, [1896] A. C. 199. Another example of an act tortious as regards a third person and resulting in damage to the plaintiff's trade being held within the principle of unfair competition is *Hughes v. McDonough*, 43 N. J. Law 459. On the other hand not every act tortious as regards prospective customers of the plaintiff, and resulting in damage to his business, will be enjoined at his request. Deceit of the public as to the quality of goods, false testimonials and untrue representations of fact, although drawing away trade that otherwise would go to the plaintiff do not entitle him to the intervention of the courts. *American Washboard Co. v. Saginaw Manufacturing Co.*, 103 Fed. Rep. 281.

The question is one of sound public policy and practical expediency. On the one hand should be considered the necessity of protecting a man's right to that trade which he has built up by his industry and enterprise, a right of property, possessing commercial value and frequently bought and sold. On the other hand lies the danger of opening too wide a field of litigation and extending the range of tort liability too far beyond those persons against whom the wrongful acts are primarily directed. The principal case is one about which no difference of opinion will arise as to the expediency and good policy of equitable intervention. Corporations engaged in public employments should not be permitted to build up their own or another's business by the abuse of those powers with which, by reason of the nature of their calling, they have become invested. The discrimination complained of in the principal case was clearly such an abuse. The fact that under the circumstances the persons directly discriminated against were not likely to complain rendered the damage to the plaintiff all the more certain and the good policy of the court's intervention all the more clear.

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**THE CARE REQUIRED OF DIRECTORS.** — Whatever may be the precise relation of directors to their corporation, their direct responsibility is to the corporation. On insolvency, the right to hold them accountable passes to the receiver. 3 THOMP., CORP., § 4121. In a recent case in New Jersey, the directors of a bank were held liable to the receiver for loss resulting from negligence in supervising the management of the bank. *Campbell v. Watson*, 50 Atl. Rep. (N. J. Ch.) 120. The principal negligence complained of was a failure to make examinations with the frequency stipulated in the by-laws, and especially a total failure to look at the balance sheets returned by a correspondent bank, in consequence of which the cashier was able to draw drafts for amounts in excess of those entered on the books.

It has been suggested that directors should be liable only for gross negligence. *Swentzel v. Penn Bank*, 147 Pa. St. 140. It is said that they are gratuitous mandataries, and cannot be expected to give a great amount of attention to the position. If they are held strictly accountable, no honest man will desire to accept the position. *Spering's Appeal*, 71 Pa. St. 11. On the other hand it is urged that such a test would allow directors to give a corporation credit by the use of their names, while remaining practically figureheads. Accordingly the rule of reasonable care

under the circumstances is adopted. *Gibbons v. Anderson*, 80 Fed. Rep. 345; *Hun v. Cary*, 82 N. Y. 65. This is the broad rule, so often applied in other connections, and is much preferable both theoretically and practically, avoiding as it does the rather discredited doctrine of degrees of negligence. Obviously also the care which ought to be bestowed must vary with the nature of the business, and the time and place of its exercise. The care of a prudent man in his own business and the care ordinarily exercised by directors would seem to be valuable rather as evidence of what is reasonable care than as direct standards of care. Probably many of the differences in the cases are due rather to the application of the law to the facts than to any marked conflict in the conception of the law; differences as to what constitutes reasonable diligence. Cf. *Briggs v. Spaulding*, 141 U. S. 132; *Percy v. Millaudon*, 8 Mart. N. S. (La.) 68. The principal case in the main adopts the preferable rule stated above. Moreover, its application of the law to the facts, though the result is extremely hard on the directors, seems justified.

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THE SPECIFIC ENFORCEMENT OF CONTRACTS BY INJUNCTION. — The latest decision of the English Chancery Division gives promise for the future of an intelligible treatment of the much confused subject of specific enforcement of affirmative covenants by process of injunction. *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799. A bill was brought by an electric light company against a hotel proprietor who had agreed to take from the plaintiff all the electricity he might require for five years. The prayer was for an injunction restraining the defendant from purchasing electric energy from any one other than the plaintiff during that period. In granting the injunction the court reviews the earlier decisions, and cites with approval and as embodying the now settled rule of the court the opinion of Lord Selborne in *Wolverhampton, etc., R. R. v. London, etc., R. R.*, L. R. 16 Eq. 433.

If the opinion of Lord Selborne in the case mentioned represents the present view of the English court upon this subject it may be of interest to note the general outlines and to consider the effect upon the earlier cases of *Lumley v. Wagner*, 1 DeG., M. & G. 604; *Fothergill v. Rowland*, L. R. 17 Eq. 132; *Donnell v. Bennett*, 22 Ch. Div. 835, and *Whitwood Co. v. Hardman*, [1891] 2 Ch. 416. The general principles laid down by Lord Selborne appear to be as follows. The court will first construe the contract of which specific performance is sought. The substance of the agreement as well as the language used will be regarded, and weight will not be given to the accidental use of affirmative rather than negative forms of expression. The question will then arise whether the act sought to be enjoined is a breach of the substance of the agreement, and if so, whether adequate damages can be had in an action at law. It must further appear that the contract is of a kind that equity can and will specifically enforce. Under this consideration will be raised questions of public policy, expediency, mutuality and others resting largely in the discretion of the court. If these issues all result in favor of the party seeking relief, equity will grant relief by injunction or affirmative decree, regardless of the affirmative or negative form of the original agreement.

Tested by these principles *Fothergill v. Rowland* and *Whitwood Co. v. Hardman*, *supra*, are supported, the former upon the ground of the ade-



quacy of the remedy at law, and the latter upon the ground that equity will not specifically enforce contracts for personal services. *Lumley v. Wagner* and *Donnell v. Bennett*, *supra*, however, seem inconsistent with the principles above stated. The cases, to be sure, have been distinguished upon the ground of the existence of an express covenant not to do the act enjoined. In both cases, however, that covenant was one that upon the construction of the contract would have been implied had it not been expressed, an illustration, therefore, of that accidental employment of negative rather than affirmative forms of expression to which, according to Lord Selborne, weight should not be given. Moreover, in neither of these cases did the question of the adequacy of the legal remedy play the important part assigned to it in the opinion endorsed by the principal case.

While the doctrine of *Lumley v. Wagner* cannot as yet, be said to be established in this country, it has been followed or favorably commented upon by a number of important courts. The American decisions, however, differ from the English in two respects. They have refused to limit the doctrine to cases showing an express covenant not to do the act enjoined, where upon construction of the contract an implied agreement to the same effect would be raised. *Duff v. Russell*, 60 N. Y. Super. Ct. Rep. 80; affirmed 133 N. Y. 678. They have refused to apply the doctrine to cases where the services contracted for could be rendered by a substitute, that is, to cases where there was an adequate remedy at law. *Carter v. Ferguson*, 58 Hun (N. Y.) 569. While the case of *Lumley v. Wagner* has been subjected to some criticism it must be admitted that if the doctrine be accepted the American treatment accords better with general principles of equity than its treatment at the hands of the courts from which it emanated.

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**CONTRACTS REQUIRING THE ARCHITECT'S APPROVAL AS A PREREQUISITE TO PAYMENT.** — American courts have in general shown greater leniency than the English in regard to the performance of express conditions precedent. In no class of cases is this fact better brought out than in suits on building contracts in which payment is to be made only when the architect's certificate is obtained. In England the builder must produce the certificate; he can only excuse himself by proving collusion between the architect and the defendant. *Batterbury v. Vyse*, 2 H. & C. 42; *Clarke v. Watson*, 18 C. B. N. S. 278. In most of our states fraud or gross mistake in withholding the order will entitle the plaintiff to sue on the contract without it. *St. Paul, etc., Ry. v. Bradbury*, 42 Minn. 222. *Classen v. Davidson*, 59 Ill. App. 106. But in New York, if the plaintiff can persuade the jury that he has substantially performed the contract he can recover in spite of the architect's disapproval. *Nolan v. Whitney*, 88 N. Y. 648. A recent decision in a circuit court of Ohio adopts the New York view. The plaintiff sued on a building contract containing the usual condition of payment upon presentation of the architect's certificate. He did not produce the certificate, and could not prove fraud. The jury found specially that the architect's reason for refusing the certificate was dissatisfaction with the work. The court, on appeal, sustained a general verdict in favor of the plaintiff on the ground that it was not found that the architect's refusal was reasonable. *Wicker v. Messinger*, 12 Oh. Circ. Dec. 425.

To realize how inconsistent a decision of this nature is with the strict common law doctrines it must be borne in mind that the condition was expressly precedent, that it was not fulfilled, and that no definite excuse for its breach was found by the jury. In theory the plaintiff to recover must show that the defendant prevented the carrying out of the contract. The American courts in general, moved by the extreme rigor of express conditions, have modified the law to permit recovery in cases of fraud or gross mistake. But it is conceived that the true rule is that an honest refusal of the architect to give the certificate, no matter how mistaken he may be, debars the builder from suing on the contract. *Bradner v. Roffsel*, 57 N. J. Law 412. This rule, while mitigating the harshness of the English doctrine, is yet within the fair meaning of the contract. To make it more lenient is virtually to substitute a jury for the architect. To make it more strict is to acknowledge that the latter need not give an honest judgment. Each of these results is equally undesirable, and the decision of the principal case, tending as it does to enlarge the scope of the New York doctrine, is to be regretted.

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INJUNCTIONS AGAINST PICKETING. — The ill feeling and prejudice engendered by strikes make the subject one requiring peculiar delicacy of treatment and one, moreover, of great popular interest. The system commonly known as "picketing" almost always accompanies a strike. Its purpose generally is not only to gain information but to prevent others from entering the employ of the company or person against whom the strike is directed. Whether it is tortious always, or only when it assumes particular aspects, has been the subject of considerable difference of opinion. It is apparently conceded that the use of threats or violence will be enjoined. *Murdock, Kerr & Co. v. Walker*, 152 Pa. St. 595. Some authorities refuse to go beyond this. *Krebs v. Rosenstein*, 66 N. Y. Supp. 42. Others extend the injunction to picketing in general. *Vegelahn v. Guntner*, 167 Mass. 92. In a recent case in Ohio an injunction was granted against all picketing. *Dayton, etc., Co. v. Metal Polishers, etc., Union*, 11 Dec. (Ohio) 643.

Perhaps the most satisfactory way to treat a subject of this sort is to adopt the view of Mr. Chief Justice Holmes that the intentional infliction of damage is *prima facie* actionable. 8 HARV. L. REV. 1. This would of course include intentional interference with another's business. Obviously, such interference is actionable if it is accomplished by a direct tort against his person or property. The general rule is that it is also actionable if accomplished by inducing a third person to break a contract with him. *Lumley v. Gye*, 2 E. & B. 216; *Jones v. Stanly*, 76 N. C. 355. Although no actual tortious methods are used, interference is still actionable *prima facie*. In other words, it is actionable unless there is some justification. The ordinary pursuit of business or competition in trade furnishes a justification, much as the right of a man to use his real estate as he pleases furnishes a justification for the intentional infliction of damage by such means as "spite fences." *Letts v. Kessler*, 54 Oh. St. 73. See *Mogul S. S. Co. v. McGregor, Gow & Co.*, 23 Q. B. D. 598; L. R. [1892] A. C. 25. It would seem that ordinarily the competition between employer and employee, and among employees themselves, which is just as real as that between business interests, should furnish a justification.



Holmes, J., dissenting, in *Vegelahn v. Guntner*, 167 Mass. 92, 104. Of course these justifications, while they excuse the infliction of some kinds of intentional damage, cannot excuse all. For example, they would not excuse direct torts against the person or property of the rival, nor preventing others from dealing with him by the use of violence or other means tortious as against them. See *Tarleton v. M'Gawley*, Peake 270.

To apply these principles to the subject in hand, it would seem that theoretically perfectly peaceful picketing would be justifiable. Such picketing is conceivable; but, as a practical matter, picketing generally is not, and from the nature of the circumstances cannot be, perfectly peaceful. The very presence of a picket usually contains a threat of violence. It is *per se* a tortious act as regards the prospective employees — an assault often accompanied by a battery. Therefore it should be actionable where there has been any damage to the prospective employer.

The ground of equity jurisdiction is clear. Irreparable damage is threatened, and there is a continuing injury, so that resort to the legal remedy would result in a multiplicity of suits. *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 126. It would be inadvisable to divide up the injunction so as to prohibit tortious actions and permit peaceful picketing on account of the difficulty which has been suggested of separating one from the other. Since, however, the granting of the injunction is largely in the discretion of the court, there would seem to be no reason why the court should not first look at the circumstances, and the general progress of the strike. If the strikers in all their dealings have been so fair and conciliatory that it is apparent that a picket established by them would be peaceful and friendly, though such a state of affairs may be rare, then the injunction might well be refused altogether. Otherwise the injunction should be granted.

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DAMAGES FOR TESTAMENTARY LIBEL. — The liability of a decedent's estate for libellous matter inserted by the decedent in his will is a subject which seems never to have attracted the attention of legal authors nor to have hitherto received adjudication. A probate court of Pennsylvania, however, has recently been called upon to determine this novel question. *In re Gallagher*, 49 Pitts. L. J. 161. The petitioner against the estate claimed damages for a libel upon him in the testator's will, the publication of the libel being by probate of the will. The court, after determining that the maxim — *actio personalis moritur cum persona* — has no literal application, is led to allow the action by a consideration of the great injury that the petitioner (an attorney) will suffer in his professional character by an imputation thus perpetuated in a public record. One's sympathy is strongly roused in behalf of the libelled claimant. Nevertheless it is impossible on any established theory of the law to support the decision, desirable as it is in its result.

If the libel had been published by the testator to the witnesses, for example, a cause of action would have arisen against him. But at common law this would have abated at his death. *Walters v. Nettleton*, 5 Cush. (Mass.) 544. And the statutory modifications of the old rule of abatement do not, except in a very few states, apply to the action of libel. See 21 Cyc. Pl. & Pr. 349. But the publication complained of is

by probate so that no cause of action ever existed against the testator. Even if by a fictitious relation of time, such as a disseisee may invoke in bringing suits after re-entry, the publication be carried back to his lifetime, the objections of abatement still apply. To support the action, therefore, necessitates the conception of the deceased's estate as a legal entity, itself capable of committing a tort. Were such a conception justifiable the analogy of a corporation's responsibility for libel would permit the estate to be held. *Whitfield v. South Eastern Ry. Co.*, E. B. & E. 113. In the Roman law, it is true, the deceased's estate was considered a juristic person, though perhaps only as regards rights of property. WINDSCHIED, PAND., § 531. But such personification is completely foreign to the common law theory which deals with the estate through administrators and executors, and not as an artificial person. Unfortunate as the result may be, we are driven to the conclusion that the common law is powerless to recompense one damaged by testamentary libel. Its only weapon against this ingenious and infamous method of doing injury rests in the probate court's power to strike out the libellous matter, a power which courts seem reluctant to exercise. See *In the Goods of Honywood*, L. R. 2 P. & D. 251.

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PERFORMANCE IN IGNORANCE OF REWARD AS ACCEPTANCE OF OFFER. — The question as to whether or not the performance of the conditions of an offer in ignorance of that offer creates a binding contract is answered in contradictory ways in two distinct lines of decisions — one holding that the contract is completed the moment the claimant performs the prescribed services, even though he act without knowledge and consequently without any intention of acceptance, *Eagle v. Smith*, 4 Houst. (Del.) 293; *Dawkins v. Sappington*, 26 Ind. 199; the other holding that without knowledge of the offer there can be no acceptance nor contract, as the essential element of mutual assent is lacking. *Howland v. Lounds*, 51 N. Y. 604; *Chicago & A. R. R. Co. v. Sebring*, 16 Ill. App. 181. In the first class of cases the courts base their decisions on grounds of morality and public policy, and acknowledge the anomaly of such contracts, while in the second class the decisions as indicated are based wholly on the lack of mutual assent.

One of the grounds of decision in a late Illinois case involves a consideration of this point, the court holding that a claimant cannot recover, when he has given the required information either before the reward therefor is offered, or at a time when he is ignorant that any reward has been offered. *Williams v. West Chicago St. Ry. Co.*, 61 N. E. Rep. 456. The court argues that the right to recover a reward arises out of the contractual relation between offeror and claimant, implied by law, "the reason of the rule being that the services of the claimant are rendered in consequence of the offered reward, from which an implied promise is raised on the part of the person offering the reward to pay him the amount thereof;" and that no such promise can be implied unless the claimant knew at the time of performance that the reward had been offered. It would seem that the decision in *Fitch v. Snedaker*, 38 N. Y. 248, relied upon in so many other decisions, and chiefly cited in the principal case does not involve the precise point in question. In *Fitch v. Snedaker*, *supra*, the claimant had performed before the reward was

offered. Clearly such performance is not a good consideration, as one cannot very well accept an offer before it is made. In the further case of *Stamper v. Temple*, 6 Humph. (Tenn.) 113, also relied upon, the court's opinion on this precise point is probably *obiter*. An English case also usually cited in this connection, in deciding that the reward need not be the motive for the performance does not necessarily decide that knowledge on the part of the claimant is absolutely unessential. *Williams v. Carwardine*, 4 B. & Ad. 621.

If the view be adopted that knowledge is not a prerequisite, an exception must be made to the rule of contracts requiring mutual assent, an exception which it would seem is hardly justifiable. There is great force, however, in the argument that allowing a recovery in such cases is good policy, in that the public will be influenced to be more zealous in their efforts to arrest and convict criminals, restore lost property, etc., without in the least bringing any hardship on the offeror. But if public policy does demand that a recovery in such a case be allowed, it should be not on a contractual but on a *quasi*-contractual basis. Strictly then the principal case would seem to be logically sound, and in no way to depart from the theory of *assumpsit*. If we regard a contract as a bargain where both parties must intend that one thing be given in exchange for the other, knowledge seems essential. Furthermore an historical analysis of the action of *assumpsit* also strengthens the *ratio decidendi*, for when it is remembered that *assumpsit* is but a development from the action of deceit, where the plaintiff's cause of action rested largely on the fact that he had placed reliance on the defendant's offer or representation, knowledge on the part of the plaintiff seems all the more necessary.

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THE RESPONSIBILITY OF THE EMPLOYER OF AN INDEPENDENT CONTRACTOR IN REGARD TO WORK ON A HIGHWAY. — The general rule that there is no liability for the negligence of an independent contractor is well settled. The mere employment of an independent contractor, however, does not always relieve the employer of responsibility. For example, if a municipality employs an independent contractor to make excavations in a highway, it is generally held that the municipality is liable for injury resulting to one using the highway from the negligence of the contractor in not surrounding the excavations with proper protections or in leaving the work improperly done. *Penny v. Wimbledon, etc., Council*, [1899] 2 Q. B. 72; *Circleville v. Neuding*, 41 Oh. St. 465. See *contra*, *O'Hale v. Sacramento*, 48 Cal. 212; *City of Erie v. Caulkins*, 85 Pa. St. 247. The ground of liability is that there is a positive duty imposed by law upon the municipality to see that the streets are in a reasonably safe condition, and it cannot be relieved of this duty by employing an independent contractor to carry it out. 2 DILL., MUN. COR., 4th ed., §§ 1027–1031. In other words, it is not really the independent contractor's negligence for which the municipality is held, but its own failure to fulfil a positive duty.

A somewhat similar question arises where an individual or corporation is permitted by public license to make excavations in the highway. This question was presented in a recent case in New York. The defendant railway was given authority by statute to cross a highway. Apparently the only conditions were that certain specifications should be followed,

and that the highway should be restored so as not to impair its usefulness. The whole construction of the road was delegated to an independent contractor, who negligently failed to put lights on an embankment thrown up on the highway, in consequence of which the plaintiff driving along the highway ran into it and was injured. The court expressly disapproved of a prior New York decision on this point and held that the defendant was liable. *Deming v. Terminal Ry. of Buffalo*, 169 N. Y. 1.

It has been thought that the employer is not liable on such a state of facts. *Smith v. Simmons*, 103 Pa. St. 32. Other courts have reached the result of the principal case on the grounds taken in the municipality cases. *Gray v. Pullen*, 5 B. & S. 970. This reasoning is tenable wherever the statute granting the license has in fact imposed affirmative precautionary duties. Unless such positive duties are imposed the analogy perhaps fails. There is, however, another ground upon which the liability may rest. It is well recognized that if what the employer contracts for is a public nuisance he is not relieved by the fact that it is created by the independent contractor. *Ellis v. Sheffield, etc., Co.*, 2 E. & B. 767. An excavation or obstruction in the highway is *per se* a nuisance. So far as it is authorized by law it is of course not actionable. It remains a nuisance, however, and, in so far as it is not surrounded by the precautions which are required by the statute or which ought reasonably to be taken, any injury resulting therefrom is actionable. *Woodman v. Metropolitan R. R. Co.*, 149 Mass. 335; *Colgrove v. Smith*, 102 Cal. 220. In this way the desirable result of the principal case is reached, whether or not there be express statutory requirements.

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SEVERANCE OF CHATTELS FROM THE REALTY BY A DISSEISOR. — To the layman it seems obvious that if a disseisor cuts down and carries away trees from the disseisee's land, the latter should at once be able to recover the logs or their value directly. According to the authorities, however, such is not the law, and under such circumstances before a recovery of the land neither trover, replevin, nor assumpsit will lie for the severed realty. *Lehigh, etc., Co. v. New Jersey, etc., Co.*, 55 N. J. Law 350; *Anderson v. Hapler*, 34 Ill. 436; *Bigelow v. Jones*, 10 Pick. (Mass.) 161. A recent case suggests the question anew holding that the disseisee cannot recover either the logs or their value. *Clarke v. Clyde*, 66 Pac. Rep. 46 (Wash.). No class of cases better illustrates the important part which the ancient doctrine of seisin still plays in the modern law. The reasons usually stated for the rule are, it is true, the undesirability of trying title to land in a transitory action, and the inexpediency of allowing the actual occupant to be harassed by frequent suits when a single real action would settle the dispute. See *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509; *cf. Wright v. Guier*, 9 Watts (Pa.) 172. But it seems that the real explanation must be found in the doctrine of disseisin. 3 BL. COM. 210; *Bigelow v. Jones, supra*. Actions which determine title to personal property are essentially possessory. But the right to possession of the severed realty, as chattels, is in the disseisor, for he has all the rights incident to ownership of an estate in fee simple. See 3 HARV. L. REV. 23, 28. It is noticeable, however, that the courts overlooking a similar difficulty, allow trover for timber severed and carried away by a trespasser who does not claim title to the land. *Forsyth v. Wells*, 41 Pa. St. 291.

The disseisee, however, is not left without remedy for the injuries to the premises during disseisin. In certain jurisdictions he can recover damages in ejectment; or, having re-entered, he may bring trespass *quare clausum* or an action for mesne profits. See 85 Am. Dec. 321, note. For after re-entry the seisin by a fictitious relation is regarded as having been continuously in the real owner. 3 BL. COM. 210. This fiction once granted, there seems no reason why the disseisee should not take advantage of it in trover or replevin, as well as in trespass for mesne profits. Some courts allow it. See *Alliance Co. v. Nettleton Co.*, 74 Miss. 585; *Wilson v. Hoffman*, 93 Mich. 72. Others limit the disseisee to his action for mesne profits, denying that the disseisor's title to the chattel is divested by a recovery of the land. See *Brothers v. Hurdle*, 10 Ired. (N. C.) 490; *Page v. Fowler*, 39 Cal. 412. So where the disseisee has obtained possession of the logs, the disseisor may maintain replevin. *Lehman v. Kellerman*, 65 Pa. St. 489; *Busch v. Nester*, 70 Mich. 525, *contra*. Another conflict of cases arises concerning recovery against a purchaser from the disseisor. A strong current of authority allows trespass for mesne profits even against a purchaser for value in good faith. *Trubee v. Miller*, 48 Conn. 347. Apparently, therefore, trover might be brought. See *Alliance Co. v. Nettleton Co.*, *supra*. Courts which regard the disseisor as acquiring an indefeasible title to the severed realty are necessarily *contra*. *Faulcon v. Johnston*, 102 N. C. 264. Were it possible to remould the law various changes might be suggested. This artificial doctrine of disseisin however, harsh as it may be in particular instances, seems too firmly established to be modified otherwise than by legislation.

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INTENT AS AFFECTED BY DRUNKENNESS. — It is to be regretted that the law with regard to civil suits in which the question of drunkenness arises has been left in a form far more indefinite than that of the criminal law. In the latter branch of the law the rule is well established that intoxication, though no defence, may be given in evidence to show the lack of specific intent. Though the general trend of civil decisions is in accord with this doctrine, that an act of a drunkard is still his voluntary act, there are several cases which tend to obliterate the distinction. In a recent suit on an insurance policy, under which the insurer was relieved of liability for intentional injuries, the insured had his thumb bitten by a drunken man. Although the court held that the facts showed an intentional injury, it was indicated that one may become so intoxicated as to be incapable of having an intention. *Northwestern Benevolent Society v. Dudley*, 61 N. E. Rep. 207. Opposed to this *dictum* is a decision in a slander suit where evidence of the defendant's drunkenness was held inadmissible. *Mix v. McCoy*, 22 Mo. Ap. 488. The latter case is undoubtedly the sound one, as the offence — voluntarily uttering the words — was committed irrespective of malice or of any particular state of mind. The distinction accepted by the criminal law, that a drunkard's act, though voluntary, may be unaccompanied by any particular state of mind, seems now to be gradually being adopted in both tort and contract cases. According to the text writers, both at law and in equity to-day a contract made by one utterly deprived of the use of his reason by drunkenness or otherwise is generally considered void, either on grounds of policy, MARKBY, ELEMENTS OF LAW, 5th ed., § 754; or



because there can be no deliberate intention to assent. STORY, EQ. JURIS., § 231; BISHOP, NON-CONTRACT LAW, § 513; POTHIER, TRAITÉ DES OBLIGAT., § 49. The modern English cases are in accord with this view. *Pitt v. Smith*, 3 Camp. 33; *Gore v. Gibson*, 13 M. & W. 623. But Pollock, C. B., in a later case has intimated that under no conditions is the contract absolutely void. *Matthews v. Baxter*, L. R. 8 Ex. 132. This shows a tendency to revive the harsher early English doctrines. 4 BL. COM. 26. In the United States, although the authorities are in hopeless conflict, the general tendency is to consider the contract as void. This view seems correct on principle, as there can be no contract if one party, through drunkenness or any other cause, is incapable of giving assent.

In equity, and now at common law since the introduction of equitable defences, contracts made while merely under the influence of liquor are voidable, but only if the other party has obtained an unfair advantage or has purposely caused the intoxication. *Cooke v. Clayworth*, 18 Ves. 12; *Crane v. Conklin*, 1 N. J. Eq. 346. With regard to testamentary capacity a sound doctrine has been established. Intoxication at the time of making a will does not invalidate it if the testator comprehended the nature of the act. *Bannister v. Jackson*, 45 N. J. Eq. 702; *Key v. Holloway*, 7 Baxter (Tenn.) 575. Where a testator destroys his will, either while suffering from delirium tremens or when merely under the influence of liquor it is held to be not revoked. *Brunt v. Brunt*, L. R. 3 P. & D. 37; *In the Goods of George Brassington, deceased*, 18 T. L. Rep. 15. These decisions are clearly correct as a valid revocation requires an *animus revocandi*.

It seems impossible, after a review of the authorities to deduce any broad principle with which all the cases where the effect of intoxication upon intent is in issue may be reconciled. The true rule in contracts and torts as well as in criminal law seems to be that if a specific intent or a special state of mind is necessary for liability, evidence of drunkenness is admissible to negative it, otherwise not. The *dictum* in the principal case is too sweeping, apparently recognizing no distinction between an act intentionally, that is voluntarily done, and an act done with specific intent, that is an intention ulterior to the mere moving of the muscles.

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## RECENT CASES.

ADMIRALTY — GENERAL AVERAGE — CONTRIBUTING INTERESTS. — A vessel was chartered to proceed to a foreign port and there take on a cargo, freight to be payable on the completion of the voyage home. On the voyage out in ballast, the vessel grounded, and a general average sacrifice was made. The voyage was subsequently completed and the freight due under the charter paid. *Held*, that the freight is liable to contribute to the general average sacrifice. *Steamship Carisbrook Co. v. London, etc., Ins. Co.*, [1901] 2 K. B. 861.

Though freight for the voyage on which a general average sacrifice is made, is liable to contribute, there is very little authority on the question of the liability of the homeward freight, already contracted for, to contribute to a general sacrifice on the outward voyage. One case has been found in England, and one in the United States, holding that where freight is a gross sum for the round voyage, the whole freight must contribute to a general average sacrifice on the outward voyage. *Williams v.*

*London Assurance Co.*, 1 M. & S. 318; *The Brig Mary*, 1 Sprague (U. S. Dist. Ct.) 17. Military salvage was assessed on the same principle in *The Progress*, Edw. Adm. 210, 224. Logically, there is no ground for distinguishing the case of a vessel going out in ballast, under charter to bring back a cargo, from the cases above. Since the freight is payable only on the successful completion of the voyage, it is at risk and is insurable from the moment the vessel sets sail on the outward voyage. It therefore participates in the benefit from the sacrifice, and on principle should contribute to the general average.

**ADMIRALTY — PUBLIC ADMINISTRATOR — PROPERTY FOUND UPON AN UNIDENTIFIED BODY AT SEA.** — Money found upon the body of an unknown person floating at sea was paid into the registry of an admiralty court. Letters of administration were granted under Pub. St. Mass., c. 156, § 2, to the public administrator, by the probate court of the county in which the admiralty court was situated, and this suit was brought to determine rights in the fund in court after salvage had been awarded. *Held*, that the public administrator is entitled to the fund. *Gardner v. Ninety-nine Gold Coins*, 111 Fed. Rep. 552 (Dist. Ct., Mass.).

The decision involves the rights of three rival claimants, the finders, the United States and the administrator. Whatever the respective merits of the first two claims, they are admittedly subordinate to those of the real owner. The public administrator, holding office under statute and having letters of administration from a court of proper jurisdiction, stands like any other administrator in the place of the deceased. The decision therefore comes to this merely, that the claim of the owner of lost goods or his representative is paramount over all others. This is not, however, a final disposition of the case. The estate having been fully administered, the fund if any must be handed over to the Commonwealth. PUB. ST. MASS., c. 131, § 12. The interesting question, here expressly left open, as to who is ultimately entitled, must then be litigated. It is difficult to prophesy as to the outcome, since of the only two decisions found on the point, one awards the property to the finders, and the other to the United States. *Russell v. Forty Bales of Cotton*, Fed. Cas. No. 12,154; *Peabody v. Twenty-eight Bags of Cotton*, Fed. Cas. No. 10,869.

**AGENCY — APPARENT AUTHORITY — VIOLATION OF INSTRUCTIONS.** — An insurance agent had authority to accept risks upon property located within a certain prescribed territory. *Held*, that the company is not liable upon risks accepted by him outside of those limits. *Insurance Co. of N. A. v. Thornton*, 30 So. Rep. 614 (Ala.).

A principal is, in general, bound by all acts of his agent within the apparent scope of the agent's authority. *Union Mutual Ins. Co. v. Wilkinson*, 13 Wall. 222. Accordingly, an agent can bind his principal by acts that are direct violations of instructions, where persons dealing with the agent in reliance upon his ostensible authority, have neither actual nor constructive notice of such instructions. *Millville, etc., Ins. Co. v. Mechanics', etc., Assoc.*, 43 N. J. Law 652; *Ruggles v. American, etc., Ins. Co.*, 114 N. Y. 415. This reliance by the third party should, however, be reasonable and in good faith. See *Peabody v. Hoard*, 46 Ill. 242. If in any case the third person has reason to know that the agent's authority is restricted in a certain particular, he cannot hold the principal liable if it appears that the limitation was in fact transgressed. *Baines v. Ewing*, L. R. 1 Ex. 320. This can be upheld on the ground that reliance is placed, to this extent, upon the agent, not upon the principal. See *Crane v. Gruenewald*, 120 N. Y. 274. But there is nothing in the facts of the principal case as reported, to bring it within the rule of these cases. The decision is therefore wrong on principle; and it is contrary to the cases found directly in point. *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; see also *Knox v. Lycoming Fire Ins. Co.*, 50 Wis. 671.

**AGENCY — CORPORATIONS — KNOWLEDGE OF AGENT.** — The president of a bank, acting in his private capacity, acquired knowledge of the status of certain insurance policies, which were later pledged to the bank. *Held*, that his knowledge did not affect the later transaction unless he participated therein. *Smith v. Carmack*, 64 S. W. Rep. 372 (Tenn., Ch. App.).

In general, the knowledge of the agent is the knowledge of the principal. *McGurk v. Metropolitan, etc., Co.*, 56 Conn. 528; *Hoover v. Wise*, 91 U. S. 308. This rule should apply to all knowledge, however acquired, which it is the duty of the agent to communicate. *The Distilled Spirits*, 11 Wall. 356; *Hart v. Farmers, etc., Bank*, 33 Vt. 252. The rule is based on common sense principles, and therefore does not

apply where it would be clearly unreasonable. *Blackburn v. Vigors*, 12 App. Cas. 531, 537. So the knowledge is not imputed when the agent is dealing with the principal for his own benefit. *Allen v. South Boston R. R. Co.*, 150 Mass. 200, 206. Since corporations can act only through agents, the rule is of peculiar importance where they are concerned. Its application is difficult, since no principal exists capable of actual knowledge. See 6 SOUTHERN L. REV. N. S. 793. If the agent, while possessing the knowledge, acts for the corporation, the knowledge undoubtedly affects the transaction. *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394. But where, as in the principal case, there is no duty to communicate, and it does not appear that the agent participated in the later transaction or was cognizant of it, his knowledge should not be imputed to the corporation.

AGENCY — INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER. — The defendant railway company employed an independent contractor to construct a portion of its railway across a highway. The contractor negligently failed to put lights on an embankment thrown up on the highway; and the plaintiff in consequence was injured. *Held*, that the defendant is liable. *Deming v. Terminal Ry. of Buffalo*, 169 N. Y. 1. See NOTES, p. 485.

BANKRUPTCY — PROVABLE DEBTS — JUDGMENT FOR FINE. — The defendant was fined for keeping a disorderly house, and judgment was entered against him. Thereafter he was declared bankrupt and the state filed its claim for the amount of the fine. *Held*, that such a claim is not a debt provable against the bankrupt's estate. *In re Moore*, 111 Fed. Rep. 145 (Dist. Ct., W. D. Ky.).

A literal application of § 63 of the Bankruptcy Act would make the claim provable under the head of a fixed liability as evidenced by a judgment. Since § 17 discharges all provable debts except those of certain classes to which the debt in question does not belong, the fine imposed by the state would be included in the discharge if the statute were literally construed. Under former United States bankruptcy laws the rule has been laid down that debts due to the state are not barred unless specially mentioned, on the ground that the state is not generally bound by statutes except when expressly referred to. *United States v. Herron*, 20 Wall. 251. The same rule has been applied under the present act. *In re Baker*, 96 Fed. Rep. 954. Moreover it seems fair to suppose that Congress did not intend to interfere with the criminal administration of a state by discharging fines imposed as punishments. See *In re Sutherland*, 3 N. B. R. 314; and *cf. Turner v. Turner*, 108 Fed. Rep. 785, and *In re Baker, supra*. The only exactly parallel case found under the present act is *contra*, but under former acts the decisions have been in accord with the better view adopted in the principal case. *In re Alderson*, 98 Fed. Rep. 588; *In re Sutherland, supra*; *cf. Bancroft v. Mitchell*, L. R. 2 Q. B. 549.

BANKRUPTCY — SUFFERING JUDGMENT — FAILURE TO ACT AS AN ACT OF BANKRUPTCY. — The Bankruptcy Act of 1898, § 3 a, provides that "Acts of bankruptcy by a person shall consist of his having . . . suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." Judgment was entered against the defendant without his procurement, upon a note and irrevocable power of attorney to confess judgment, and a subsequent levy and sale left him entirely without means. *Held*, that the judgment and levy were a preference under §§ 3 a, 60 a; and that the defendant's failure to vacate the preference was an act of bankruptcy. *Wilson Bros. v. Nelson*, 22 Sup. Ct. Rep. 74.

Under the Act of 1867, §§ 39, 35, a judgment suffered by an insolvent debtor was not an act of bankruptcy unless there was an intent to give a preference; and the Supreme Court refused to infer that intent from mere passive non-resistance. *Wilson v. City Bank*, 17 Wall. 473. The Act of 1898, by the clause under discussion, seems on the contrary to make the result obtained by the creditor, and not the intent of the debtor, the essential fact. The decision in the principal case was reached by a divided court. The minority thought that to constitute an act of bankruptcy an exercise of will was requisite, and that the present act was not so different from the Act of 1867 as to demand a departure from *Wilson v. City Bank, supra*. The opinion of the majority is much to be preferred. It follows what seems to be the natural import of the words, and is in accordance with most of the decisions in the lower courts. *In re Moyer*, 93 Fed. Rep. 188; see 13 HARV. L. REV. 57; *contra, Duncan v. Landis*, 106 Fed. Rep. 839.



**CONTRACTS — CONDITIONS PRECEDENT — ARCHITECT'S CERTIFICATE.** — The plaintiff contracted to build a house for the defendant, payment to be conditioned on production of the architect's certificate. The plaintiff claimed payment in spite of the refusal of the certificate. After finding specially that the reason for the architect's refusal was dissatisfaction with the work, the jury gave a general verdict in favor of the plaintiff. *Held*, that the general verdict must stand. *Wicker v. Messinger*, 12 Ohio Circ. Dec. 425. See NOTES, p. 481.

**CONTRACTS — JOINT AND SEVERAL DEBTORS — RELEASE.** — A bank obtained a judgment against A and B jointly and severally for £6000. On payment of £3000 in cash and notes by B, the bank gave him a receipt in full discharge of all its claims against him. The bank then claimed a debt of £3000 against A as the balance of the judgment debt. *Held*, that the receipt to B was equivalent to a release of B from the entire debt, and consequently operated to destroy the debt as against A. *In re E. W. A.*, [1901] 2 K. B. 642 (C. A.).

A release under seal to one of two joint or joint and several debtors operates to release the other also. *Clayton v. Kynaston*, 2 Salk. 573, 574; *Hale v. Spaulding*, 145 Mass. 482. This is due to the peculiar nature of a joint liability; the right of the creditor is regarded as indivisible, and a common law release, which operates as an extinguishment of the debt, although given to but one of the debtors, must still have the legal effect of destroying the entire obligation. *Durrell v. Wendell*, 8 N. H. 369, 372. Since this is a technical rule and often violates the intent of the parties, the courts have refused to give the same effect to a mere agreement not to sue one of the joint debtors. *Hutton v. Eyre*, 6 Taunt. 289; *Berry v. Gillis*, 17 N. H. 9. The argument of circuitry of action, which ordinarily gives those agreements the effect of a release, is not applicable in a suit against the other debtor. *Garnett v. Macon*, 2 Brock. (U. S. Circ. Ct.) 185, 219. American courts have expressly declared that the technical rule should be confined to common law releases. *Line v. Nelson*, 38 N. J. Law 358; *cf. Grovenor v. Signor*, 88 N. W. Rep. 278. This would seem to be the proper rule, and no authority has been found to support the principal case.

**CONTRACTS — OFFER AND ACCEPTANCE — PERFORMANCE IN IGNORANCE OF REWARD OFFERED.** — The defendant offered a reward for the arrest and conviction of certain criminals. The plaintiff's services led to such arrest and conviction, but were substantially all rendered before the reward was offered or while he was ignorant of the offer. *Held*, that there was no acceptance of the offer. *Williams v. West Chicago St. R. R. Co.*, 61 N. E. Rep. 456 (Ill.). See NOTES, p. 484.

**CONSTITUTIONAL LAW — RIGHT TO PRACTISE MEDICINE — DISCRIMINATING EXEMPTIONS.** — A statute (Wis. Laws, 1901, c. 306) makes an examination by the state board a prerequisite to a license to practise medicine, with a proviso exempting students then matriculated in medical colleges in the state which prescribed certain specified courses. *Held*, that the act is not unconstitutional as denying to graduates of medical colleges outside the state the equal protection of the laws. *State ex rel. Kellogg v. Currans*, 87 N. W. Rep. 561 (Wis.).

The regulation of occupations, the pursuit of which by incompetent persons is dangerous to the public, is a recognized branch of legislative power. *Dent v. West Va.*, 129 U. S. 114. To secure proper qualifications the legislature may make any classification bearing some reasonable relation to that purpose. When any line is drawn its artificial character will render it unjust as to some, but unless the law is clearly arbitrary the courts should not declare it invalid. *Ex parte Spinney*, 10 Nev. 323; *People v. Phippin*, 70 Mich. 6. In the principal case the requirement imposed on the applicant is itself reasonable, but the complaint of unjust discrimination because of the exemption, is of force unless the favored class can be distinguished by some characteristic which might reasonably justify the exemption. It might perhaps be said that the legislature could rely on the character of the education furnished by the medical colleges of its own state, while it could not be expected to investigate and classify all colleges outside the state. On this ground the decision may be supported. Analogous statutes have been frequently upheld. *People v. Phippin*, *supra*; *contra, In re Day*, 181 Ill. 73.

**CORPORATIONS — EMBEZZLEMENT BY CASHIER — LIABILITY OF DIRECTORS FOR NEGLIGENCE.** — The cashier of a bank was enabled to embezzle funds by the failure of the directors to exercise proper supervision. The bank becoming insolvent, the

receiver sues the directors. *Held*, that they are liable. *Campbell v. Watson*, 50 Atl. Rep. 120 (N. J. Ch.). See NOTES, p. 479.

**CORPORATIONS—RIGHT OF ONE CORPORATION TO CONTROL ANOTHER—INJUNCTION AGAINST VOTING.**—A general act permitted incorporation for specified purposes, "or for engaging in any other species of trade or business;" the corporation so formed to have power "for carrying on all kinds of business within the objects and purposes of the company as expressed in the articles of incorporation." Under this statute a smelting company was formed, its articles stating one purpose to be the holding of stock in other companies. After it had obtained control of the stock of a previously existing smelting company, the minority stockholders of the latter sued to restrain the new corporation from voting as a stockholder in the old. *Held*, that an injunction should issue. *Parsons v. Tacoma Smelting, etc., Co.*, 65 Pac. Rep. 765 (Wash.).

The court, relying on the rule of statutory construction that power to hold stock must be expressly granted, denies that the defendant has such power. This rule served well for corporations specially chartered, for it protected stockholders from unexpected diversion of corporate funds and construed strictly state grants. See *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43; see also note, 36 Am. St. Rep. 134. In the principal case, however, these reasons fail. The articles of incorporation warn prospective stockholders and the above extracts from the general statute hardly admit a strict construction on this point. What other sound principle a construction favoring the power in question would offend, is not clear. The particular injunction granted, however, was amply justified. When one corporation has voting control over another, the exercise of which is likely to defraud minority interests, equity jurisdiction to prevent such exercise is established, though vaguely defined. *Memphis & Charleston R. R. Co. v. Woods*, 88 Ala. 630; *cf. American, etc., Co. v. Linn*, 93 Ala. 610. Such exercise of control by a corporation having corporate interests overshadowing those it has as stockholder, is held fraudulent even where similar conduct in one or more individuals as majority stockholders would not be questioned. See *Glengary, etc., Co. v. Boehmer*, 62 Pac. Rep. 839 (Col.).

**CRIMINAL LAW—LARCENY—INTENT TO DEPRIVE PERMANENTLY.**—To secure a reward offered for the arrest of any person stealing goods from a certain store, a detective, through a confederate, induced an employee in the store to steal a watch and bring it to him, whereupon he at once returned it to its owner in accordance with his original plan. *Held*, that the detective is guilty of larceny of the watch, the *animus furandi* being found in the intent to secure and keep the reward. *Slaughter v. State*, 88 S. E. 854 (Ga.).

The felonious intent necessary to larceny does not exist unless the wrong-doer intends to deprive the owner of his property absolutely, either permanently or for a very considerable length of time. *Rex v. Crump*, 1 C. & P. 658; *State v. South*, 28 N. J. Law 28. It is well settled that holding property for a reward, intending never to return it unless such reward is offered, is within this rule. *Commonwealth v. Mason*, 105 Mass. 163; *Berry v. State*, 31 Oh. St. 219. But simply holding property temporarily in the hope of a reward, intending to return it at all events, is not larceny. *Regina v. Gardner*, 9 Cox C. C. 253. In the principal case the detective's intention throughout was to return the property to the owner unconditionally; and the fact that he meant to profit collaterally by the transaction could not, under the circumstances, furnish the felonious intent. *Cf. Regina v. Holloway*, 3 Cox C. C. 241. It would seem, however, that a conviction might have been had on another ground. The servant took the watch with felonious intent, and by the procurement of the detective. The latter was therefore an accessory before the fact. But in Georgia such a larceny as this is a misdemeanor, and in misdemeanors all are held as principals. CODE OF GA., § 4409; *Kinnebrew v. State*, 80 Ga. 232.

**CRIMINAL LAW—LAWFUL ACT RESULTING IN UNLAWFUL ACTS BY OTHERS.**—The appellant, a Protestant lecturer, was in the habit of holding meetings in the streets of Liverpool, at which he spoke in highly insulting, though lawful language of the Catholic religion. As a result there were frequent breaches of the peace by Catholics among his hearers. He intended to continue the meetings. *Held*, that he was properly put under recognizance to be of good behavior. *Wise v. Dunning*, 18 T. L. R. 85 (Eng., K. B.).

Cases of this class raise the interesting question whether an act lawful in itself be-

comes unlawful if a breach of the peace by others results from the doing of it. It seems clear on principle that it can be punishable criminally only if the actor has the *mens rea*; that is, if he intends an unlawful result, or if he is guilty of culpable negligence. *Cf. Beatty v. Gillbanks*, 9 Q. B. D. 308. In the principal case it is admitted that the appellant did not intend to induce a riot. In order to find negligence, it is necessary to find that he was under a duty to use care. It is submitted that so long as a man's acts are lawful, and he does not intend to induce others to act unlawfully, there is no duty upon him to guard against the unlawful acts others may choose to commit. *Cf. State v. Evans*, 124 Mo. 397. The case seems not fairly distinguishable from *Beatty v. Gillbanks*, *supra*. The view of the court would result in placing a burdensome restriction on the right of free speech, and personal liberty in general.

**EQUITY — INJUNCTION — CONTRACT TO TRADE EXCLUSIVELY WITH PLAINTIFF.** — The defendant contracted to purchase from the plaintiff all the electrical energy that he might require in his hotel for a period of five years. *Held*, that he may be enjoined from purchasing electricity for his hotel from any one other than the plaintiff during the time covered by the agreement. *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799. See NOTES, p. 480.

**EQUITY — INJUNCTION — DISCRIMINATION BY PUBLIC SERVICE CORPORATIONS.** — The plaintiff, a water company, sought an injunction against a rival water and sewer corporation, restraining the latter from so discriminating in its sewerage rates against the plaintiff's patrons that loss of business would result to the plaintiff. *Held*, that the injunction was properly issued. *City of Mobile v. Bienville Water Supply Co.*, 30 So. Rep. 445 (Ala.). See NOTES, p. 478.

**EVIDENCE — HEARSAY — PROOF OF CONTENTS OF LOST DEED.** — The plaintiff offered, as proof of the contents of a lost deed, the testimony of a witness who had heard the deed read to the grantee by a subscribing witness. *Held*, that this evidence was wrongly excluded. *Laster v. Blackwell*, 30 So. Rep. 663 (Ala.).

There are some decisions in regard to lost wills in accord with this case. *Morris v. Swaney*, 7 Heisk. (Tenn.) 591. The better considered view is, however, *contra*. *Coxe v. England*, 65 Pa. St. 212; *Propst v. Mathis*, 115 N. C. 526, *semble*. The objection that the evidence is hearsay seems generally to have been overlooked in the former class of cases. But it is obviously offered to prove an ultimate fact, the contents of the deed, by the statement of another and not from the personal knowledge of the witness. To show that the contents of two writings are the same it is held enough for the witness to have examined one while another person read the other. *Pickard v. Bailey*, 26 N. H. 152. But this is a "classical exception" to the general rule and it is unsafe to reason from it to other cases. See 1 GREENL., EV., 16th ed., 430 ja. Moreover the balance of convenience appears to be against admitting such testimony as that offered in the principal case. To allow proof of the contents of lost documents by mere hearsay would occasion great uncertainty; and the courts have been exceedingly strict concerning the sort of proof required for such writings. See *Davis v. Sigourney*, 8 Met. (Mass.) 487.

**LIBEL — PUBLICATION IN WILL — LIABILITY OF TESTATOR'S ESTATE.** — *Held*, that the probate of a will containing libellous matter is a publication of the libel, for which the estate of the testator is liable. *In re Gallagher*, 49 Pitts. L. J. 161 (Pa., Orphans' Ct.). See NOTES, p. 483.

**MANDAMUS — DISCRETIONARY POWER — FRAUDULENT ASSESSMENT.** — A Board of Equalization, having power to assess the capital stock of corporations at its fair cash value under rules to be established by itself, fraudulently assessed certain corporations in such a way as practically to exempt their capital stock. *Held*, that the Board may be compelled by *mandamus* to assess the capital stock in accordance with a rule prescribed by the decree. *State Board of Equalization v. People*, 61 N. E. Rep. 339 (Ill.).

The decision seems to be correct, for there is no doubt that the discharge of a discretionary duty may be controlled by *mandamus* where the defendants have acted fraudulently or in bad faith. *Detroit v. Hosmer*, 79 Mich. 384. It is true that in most of the cases good faith demanded precisely the action directed by the court, whereas the principal decision apparently lays down one rule of assessment where, originally, some other might fairly have been followed. In at least one other case, however, the

legitimate scope of discretion as originally granted, was clearly thus narrowed. *State v. Board of Public Schools*, 134 Mo. 296. Moreover, such restriction may often be very advisable, since the defendants, in this class of cases, must always have shown a disposition not to comply with their duty.

**PERSONS — HUSBAND AND WIFE — VOLUNTARY ANTENUPTIAL CONVEYANCE.** — Just before marriage, X conveyed all his property on trust for himself for life, with remainders over. The plaintiff married him in ignorance of the conveyance, and now brings suit to have it set aside. *Held*, that as X is still alive and has the income of the property with which to support the plaintiff, she is entitled to no present relief. *Potter v. Fidelity, etc., Co.*, 49 Atl. Rep. 86 (Pa.).

In similar cases in the United States, the widow is allowed, after the death of the husband, to obtain dower in the lands conveyed. The proper basis for such decisions seems to be the duty of good faith towards each other incurred by persons engaged to be married. See 14 HARV. L. REV. 452. The deed, however, is set aside only to the extent of allowing dower. *Chandler v. Hollingsworth*, 3 Del. Ch. 99. Similarly, since a wife has no control of her husband's property, the deed should not during his lifetime be declared wholly void, unless perhaps when the husband has thereby rendered himself unable to support his wife. The result in the principal case seems so far correct. But see, *contra*, *Beere v. Beere*, 79 Ia. 555; *Way v. Way*, 67 Wis. 662. Since, however, the deed as it stands bars the possibility of dower, or the corresponding statutory right in the personal estate, a decree that the deed is void so far as it interferes with those rights would seem proper, and this would make further litigation unnecessary. In the only two cases found directly in point, except those above cited, such a decree was made. *Petty v. Petty*, 4 B. Mon. (Ky.) 215; *Leach v. Duvall*, 8 Bush (Ky.) 201.

**PERSONS — MORTGAGE BY INFANTS — AVOIDANCE.** — The plaintiff, while an infant, obtained advances from a building society, to purchase a piece of land and to erect houses thereon. The land was conveyed to the infant by the vendor and the next day mortgaged to the society to secure the advances. On learning of the plaintiff's infancy, the society took possession of the property. When the plaintiff attained her majority, she repudiated the contract and mortgage, and brought action for possession. *Held*, that the mortgage is void; yet, since but for the advance of the purchase money the vendor would have had a vendor's lien, the society can to the extent of the purchase money stand in the vendor's shoes. *Thurstan v. Nottingham, etc., Society*, [1902] 1 Ch. 1 (C. A.).

The lower court held that the plaintiff could not repudiate the mortgage, and affirm the conveyance, on the unsatisfactory ground that they were one transaction. See comment in 14 HARV. L. REV. 388. The Court of Appeal, though recognizing the hardship on the society, felt able to protect it only so far as could be done on the doubtful theory of vendor's lien. It would seem that the court might, on sound legal principle, have protected the society to the full extent of its advances. When an infant, on coming of age, disaffirms a contract, he is bound to restore whatever of the consideration still remains in his hands. *Badger v. Phinney*, 15 Mass. 359. If he no longer has the consideration *in specie*, such of his property as can be identified as the direct proceeds of the consideration is liable to the other party's claim. *MacGreal v. Taylor*, 167 U. S. 688. On this view, though it be admitted that the mortgage is void, the plaintiff would, unless willing to perform the contract, hold land and buildings, the proceeds of the advances, subject to a constructive trust for the society. *Cf. Dyer v. Jacoway*, 42 Ark. 186.

**PERSONS — PARENT AND CHILD — DUTY TO SUPPORT.** — By a divorce decree custody of the minor children was awarded to the wife. *Held*, that money expended by her in support of the children after the divorce, can be recovered from the father. *Eldred v. Eldred*, 87 N. W. Rep. 340 (Neb.).

There being no state statute on the subject, the case assumes the existence of a common law duty resting on a father to support his minor children. The conflict of authority on so fundamental a point is striking. In England and in many American jurisdictions it is denied that such a common law duty exists. *Shelton v. Springett*, 11 C. B. 452; *Kelley v. Davis*, 49 N. H. 187. The early English authorities seem to support this view. See *Mortimore v. Wright*, 6 M. & W. 482. It is said that the common law prefers to leave the enforcement of moral duties of this kind to the natural impulses of the individual. 1 CHIT. BL. 448, note. Some American jurisdictions

hold that the common law does impose such a duty. *Brow v. Brightman*, 136 Mass. 187; *Hall v. Green*, 87 Me. 122. An early statute, 43 Eliz. c. 2, which is a part of the common law of this country, requires fathers, if able, to support poor and impotent children. On this statute is based the criminal liability of a parent for neglect resulting in injury to the health of a child of tender years. *Rex v. Friend*, R. & R. 20. The statute is construed as referring only to children unable to care for themselves. See *Finch v. Finch*, 22 Conn. 411. It would seem that the doctrine tacitly adopted in the principal case can be supported only if the children were within this statute.

**PERSONS — PARENT AND CHILD — SUPPORT OF CHILDREN AFTER DIVORCE.** — By a decree of divorce, the wife was awarded alimony and given custody of the children, no express provision being made for their support. *Held*, that the father's liability for their maintenance continues. *Eldred v. Eldred*, 87 N. W. Rep. 340 (Neb.).

This question could arise only in jurisdictions recognizing the father's legal duty to support his children. In many such jurisdictions it is held that the right to services and the duty to support go hand in hand; and accordingly that, when the children are given into the keeping of the mother, the father's duty to support them ceases. *Burritt v. Burritt*, 29 Barb. (N. Y.) 124. Other authorities give such effect to the decree only when it is coupled with an award of alimony. *Draper v. Draper*, 68 Ill. 17. It would seem that alimony ought to be regarded as exclusively for the wife. See *Richmond v. Richmond*, 2 N. J. Eq. 90. But when she is given custody of the children most courts undoubtedly allow that fact to influence them in fixing the amount of the alimony. The balance of authority seems, however, to incline toward the rule of the principal case, on the very good ground that the father ought not to be allowed by his own wrong to cast off his obligation to his children. *Pretzinger v. Pretzinger*, 45 Oh. St. 452. It would seem that all difficulty might be avoided by statutes requiring courts in all such cases to make separate awards for the wife and for the children.

**PROPERTY — ANCIENT LIGHTS — RIGHT TO AN EXTRAORDINARY AMOUNT OF LIGHT.** — The plaintiffs, who had acquired an easement of light, needed an extraordinary amount of light for their business. According to the finding of the court, the defendants' newly erected building cut off a substantial amount of light, but enough remained for all ordinary purposes of inhabitancy or business. *Held*, that the plaintiff is entitled to relief. *Warren v. Brown*, [1902] 1 K. B. 15 (C. A.).

Up to within forty years, it seemed to be settled law in England that action would not lie for obstruction of ancient lights merely because the plaintiff had less light than formerly, but only if material inconvenience in ordinary occupations was caused. *Fishmongers' Co. v. East India Co.*, 1 Dick. 163; *Back v. Stacey*, 2 C. & P. 465. Some cases, of late years, have followed the old rule. *Lanfranchi v. MacKensie*, L. R. 4 Eq. 421. The tendency, however, has been toward the view adopted in the principal case by the Court of Appeal. *Lazarus v. Artistic Photographic Co.*, [1897] 2 Ch. 214; *cf.* also *Mackey v. Scottish Widows, etc., Society*, Ir. Rep. 11 Eq. 541. Logically, the decision in the principal case is sound. On grounds of expediency, however, it is open to objection. If a building cannot be put up which would cut off a substantial amount of light from neighboring ancient windows, even though sufficient light is left for all ordinary occupations, an unnecessarily serious restraint is placed upon the beneficial use of property. Prescriptive easements of light are not recognized in this country; but some jurisdictions hold that the grantee of land has an easement of light by implied grant over the adjoining unimproved land of his grantor. *Sutphen v. Therkelson*, 38 N. J. Eq. 318. It is to be hoped that those jurisdictions will not adopt the rule of the principal case, as to what constitutes actionable interference.

**PROPERTY — CHATTELS SEVERED BY DISSEISOR — ACTION BEFORE RE-ENTRY.** — The defendant, being in possession of the plaintiff's land under a *bona fide* claim of title, cut down and removed trees. *Held*, that before re-entry, neither the logs nor their value can be recovered. *Clarke v. Clyde*, 66 Pac. Rep. 46 (Wash.). See NOTES, p. 486.

**PROPERTY — STATUTE OF LIMITATIONS — ACCRUAL OF ACTION ON COVENANT OF WARRANTY.** — The defendant in 1886 conveyed to the plaintiff with covenant of warranty land then possessed, under contract of purchase, by a third person, who in September 1890 obtained a decree for a conveyance. *Held*, that an action on the covenant of warranty, brought in August 1895, is not barred by a five-year statute of limitations. *Watson v. Heyn*, 86 N. W. Rep. 1064 (Neb.).



Covenants of warranty are generally treated as coextensive with covenants for quiet enjoyment. See RAW., COV., 5th ed., § 114. These two covenants have at least the common characteristic that in general they remain unbroken till eviction by a paramount owner. *Real v. Hollister*, 20 Neb. 112; *Howard v. Maitland*, 11 Q. B. D. 695. If, however, when the land is conveyed, the paramount owner already has possession, a breach occurs immediately. *Ilsey v. Wilson*, 42 W. Va. 757, 772; *Shattuck v. Lamb*, 65 N. Y. 499; see RAW., COV., 5th ed., § 139. In the principal case the paramount owner, though his right was at first purely equitable, was always entitled to the possession which he held. Therefore under the principle apparently governing the authorities, that these covenants are broken when the covenantee is excluded from possession by one having a paramount right, and then only, it follows that when the defendant's deed was delivered, his covenant was broken and the statute began running. A former opinion by the Nebraska court adopts such a view. See *Heyn v. Ohman*, 42 Neb. 693. The present decision, that a second breach occurred when the decree divested the title, is opposed to the established principle of such cases as *Real v. Hollister*, *supra*.

PROPERTY — VESTED AND CONTINGENT INTERESTS. — Subject to a life interest, a testator devised all his estate to unborn children of his son, but a subsequent clause provided that no such child should acquire any interest unless he should live to the age of thirty. *Held*, that the devise was not void for remoteness, because children subsequently born took at birth a vested interest. *Chapman v. Cheney*, 61 N. E. Rep. 363 (Ill.).

A conditional future interest is vested or contingent according as it is subject to a condition subsequent or precedent, and the nature of the condition depends on the intention with which it is created as shown by the language used. GRAY, PERP., §§ 101, 102, 108. Generally, if the conditional element forms a part of the description, the interest is construed as contingent, while if it is added in a subsequent clause the interest is held to be vested. *Price v. Hall*, L. R. 5 Eq. 399; *Blanchard v. Blanchard*, 1 Allen (Mass.) 223. But, although such a clause would ordinarily operate to divest interests previously given, an express direction as to the period of vesting may, on a proper construction of the whole instrument, change the character of those interests, making them contingent. *Russel v. Buchanan*, 7 Sim. 628. In the principal case the proviso appears to make expressly contingent the interests which from the description alone would be vested on the birth of a child; and the decision, in following the common tendency to favor the vesting of estates, seems to do violence to the expressed intention of the testator.

SALES — STOPPAGE IN TRANSITU — END OF TRANSIT. — A consignee having failed to remove his goods from the car within the time required by the rules of the railway company, the latter stored the goods in its sheds, where they remained for two months, subject to freight and storage charges. At the end of this time the consignor notified the company not to deliver the goods. *Held*, that the right of stoppage *in transitu* still remained. *Brewer Lumber Co. v. Boston & Albany R. R. Co.*, 60 N. E. Rep. 548 (Mass.).

It is often said that the right of stoppage *in transitu* exists only so long as the goods remain in the hands of the carrier as carrier. See *Langstaff v. Stix*, 64 Miss. 171. This would terminate the right of stoppage simultaneously with the carrier's strict liability, as to the exact duration of which different rules prevail. See *Richards v. Michigan, etc., R. R. Co.*, 20 Ill. 404; 9 HARV. L. REV. 153. Most of the cases involving the right of stoppage are consistent with the rule suggested, though commonly the termination of the carrier's strict liability was not the test expressly applied. *Cf. Seymour v. Newton*, 105 Mass. 272; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137. Some cases, however, have been found that cannot be harmonized with this view. *Cf. Greve v. Dunham*, 60 Ia. 108. This is true of the principal case, which furthermore indicates that lapse of time does not affect the right. The rule upon which the decision rests is, however, thoroughly sound. The right of stoppage should remain until delivery, or until the carrier, by virtue of some agreement or previous understanding between himself and the consignee, wholly apart from the original employment as carrier, has constituted himself the agent of the consignee to hold the goods. See *Jeffris v. Fitchburg R. R. Co.*, 93 Wis. 250.

STATUTE OF FRAUDS — SUBSEQUENT MEMORANDUM — EFFECT ON INTERMEDIATE VOLUNTARY CONVEYANCE. — In consideration of the plaintiff's promise to

marry him, X orally promised to convey certain land to her. Subsequently he voluntarily conveyed it to third persons and recorded the deed. The plaintiff, in ignorance of the conveyance afterwards, married him. Sixteen years later X made a deed to her of the same land, reciting the parol agreement. The plaintiff brings suit to be let into possession as owner. *Held*, that she is entitled to the land. *Brinkley v. Brinkley*, 39 S. E. Rep. 38 (N. C.).

The court rests the decision on the ground that a conveyance by a man just before marriage and without the knowledge of the intended wife is a fraud on her marital rights. It is, however, difficult to see why this should entitle her to more than a decree that as far as the deed interferes with her dower it is void. *Leach v. Duvall*, 8 Bush (Ky.) 201. See p. 494, *supra*. Nor is a voluntary deed which is recorded, void under the state code as against a subsequent purchaser. *Taylor v. Bateman*, 92 N. C. 601. Consequently the plaintiff's claim rests upon the parol agreement, and the subsequent marriage and deed. No exactly similar case has been found, but purchasers for value with notice and attaching creditors have been protected against subsequent memoranda of oral transfers or performance of oral contracts. *Asher v. Brock*, 95 Ky. 270; *White v. O'Bannon*, 86 Ky. 93; *Sampson v. Thornton*, 3 Met. (Mass.) 275. In the principal case the contract with the wife was unenforceable at the time of the first conveyance, which was therefore entirely lawful. *Cf. Van Cloostere v. Logan*, 149 Ill. 588. Aside from the question of dower, the plaintiff had no equity at that time, and it is submitted that it would be going far to allow a subsequent memorandum to affect the first grantees.

**SURETYSHIP — STATUTE OF LIMITATIONS — EFFECT OF DISCHARGE OF PRINCIPAL.** — The defendant, having mortgaged his property, sold it to one who promised to pay the mortgage debt. The court found that the mortgagee accepted him as her debtor so that she became bound by the relation of suretyship existing between the mortgagor and the buyer. The statute of limitations ran against the mortgagee's claim as to the buyer, but the mortgagor had been out of the state, so that the statute had not run in his favor. *Held*, that as the mortgagor was the surety of the buyer, the creditor's right of action against him is barred also. *Mulvane v. Sedgley*, 64 Pac. Rep. 1038 (Kan.).

As in the ordinary contract of suretyship, the promise of the surety to pay was conditioned on no act of the creditor. *Cf. Campbell v. Sherman*, 151 Pa. St. 70. In order to hold a surety, the creditor need not first sue the principal, for mere indulgence to the principal does not discharge the surety, though he is injured thereby. *Hunt v. Bridgham*, 2 Pick. (Mass.) 581. As is well known, the statute of limitations does not destroy the obligation of a contract, but merely bars the remedy. *Cf. Governor v. Signor*, 88 N. W. Rep. 278. It is not easy, therefore, to find a ground on which to support the principal case. The surety could have protected himself by bringing a bill in equity to compel the principal to pay. *Bishop v. Day*, 13 Vt. 81. He may also, if required to pay the obligation himself, sue the principal for indemnity, and since this right of action arises only on payment, it is not barred by the running of the statute in favor of the principal as to the original debt. *Thayer v. Daniels*, 110 Mass. 345. It is established that if a creditor fails to bring an action against the administrator of a deceased debtor within the time of the special statute applicable in such cases, the surety is not discharged. *Minter v. Branch Bank, etc.*, 23 Ala. 762. It seems that in the principal case equally the surety should be held liable. Such was the decision in *Whiting v. Clark*, 17 Cal. 407; *contra, Auchampaugh v. Schmidt*, 70 Ia. 642.

**TORTS — DRUNKENNESS — INTENTIONAL INJURIES.** — The defendant insured the plaintiff against accident under a policy exempting from liability for injuries intentionally inflicted. The plaintiff was bitten by a drunken man. *Held*, that the defendant is not liable. *Northwestern Benevolent Society v. Dudley*, 61 N. E. Rep. 207 (Ind., App. Ct.). See NOTES, p. 487.

**TORTS — INJUNCTION — PICKETING.** — A strike was declared against the plaintiff by the defendant union. The plaintiff brought a bill in equity against the union and other defendants to restrain them from picketing its factory. *Held*, that the bill is properly brought. *Dayton, etc., Co. v. Metal Polishers, etc., Union*, 11 Dec. (Ohio) 643 (Com. Pleas). See NOTES, p. 482.

**WILLS—CONSTRUCTION—INCONSISTENT DEVISES.**—A testator devised to his wife "all his real and personal property." By a later clause he devised the real estate, "at the death of my said wife," to his daughters. *Held*, that a fee simple is given to the wife, and the devises to the daughters are void as repugnant. *Fenstermaker v. Holman*, 61 N. E. Rep. 599 (Ind., App. Ct.).

In Indiana the common law rule ordinarily prevails, that a general devise gives only a life estate; but where a will disposes of realty and personalty in the same words, since the entire estate in the personalty passes, the devise of the realty is held to pass the fee. *Mulvane v. Rude*, 146 Ind. 476. The purpose of this exception is clearly to carry out the testator's intention, the fundamental object in construing a will. *Finlay v. King's Lessee*, 3 Pet. 346, 377; *Whitcomb v. Rodman*, 156 Ill. 116. But this intention should be gathered from the entire will. *Dickison v. Dickison*, 138 Ill. 541; *L'Etourneau v. Henquent*, 89 Mich. 428. The court decided the principal case on the ground that where a devise in fee is made, a later restriction fails. *Yost v. McKee*, 179 Pa. St. 381. A rule of construction, laid down to carry out the testator's intention, is thus regarded as a fixed rule of law, and invoked to defeat what, viewing the will as a whole, appears to be the testator's intention. The sound position would seem to be that mere rules of construction should always yield to clearly expressed intention; and accordingly the wife should have been held to have only a life estate. See *Matter of James*, 146 N. Y. 78.

**WILLS—EFFECT OF BENEFICIARY'S DEATH ON DISTRIBUTION OF INCOME—VESTING OF PRINCIPAL.**—A fund was bequeathed to trustees to pay the income to J. for the support of herself and infant children, each child on coming of age to receive a share of the income, "the same being divided into as many equal shares as there shall be children . . . and one more share for" J. At J.'s death the trustees were to pay over the fund to the children "and if any of said children shall have died leaving issue, such issue shall receive their parent's share." One of the children attained majority and died testate in his mother's lifetime leaving no issue. *Held*, that he had no interest in the income which he could dispose of by will, and that the entire future income should be redistributed among the surviving beneficiaries. *Dougherty v. Thompson*, 167 N. Y. 472.

The will contained no provision for the contingency of a child dying without issue before the mother. In supplying this omission the court assumes, fairly enough, that, except when otherwise provided, the income was intended to go as nearly as possible in the same way as the principal. In construing the provision as to the distribution of the fund, the court infers from the omission above-mentioned, coupled with the devise to issue of deceased children, that any child's right to share in the principal was intended to be contingent on his surviving the mother. This inference, which serves to support the decision as to the income, is one neither necessary nor reconcilable with the authorities. Postponement of distribution, if due merely to the existence of life interests, does not prevent rights in a principal fund from vesting immediately; and this though the intended class may increase before the distribution. *In re Bennett's Trust*, 3 K. & J. 280; *Stanley v. Stanley's Adm.*, 92 Va. 534; *Budd v. Haines*, 52 N. J. Eq. 488. In the principal case, the shares having vested, the issue of deceased children would take by executory devise, but in default of such issue there is no provision by which the shares could be divested. See *Strother v. Dutton*, 1 DeG. & J. 675; *cf. Smither v. Willock*, 9 Ves. Jun. 233. These considerations seriously discredit the decision as to the income.



## BOOKS AND PERIODICALS.

**TESTS OF INSANITY IN CRIMINAL CASES.** — The persistence of the knowledge of right and wrong test of insanity in criminal cases is one of the most striking instances of the conservatism of the law. This rule of responsibility was based on early medical error and cannot be reconciled with the doctrine of criminal intent in the light of modern scientific knowledge, yet it retains its place in England and in a majority of the jurisdictions in this country. The latest assault on this rule is in the form of a plea for the substitution of the irresistible impulse test. *Insanity in Criminal Cases*, by W. H. Parry, 63 Albany L. J. 429, 459 (Nov., Dec., 1901). This broader doctrine recognizes power both to distinguish and to choose between right and wrong as necessary for responsibility. It has received strong support in this country. *Montgomery v. Commonwealth*, 88 Ky. 509; see 8 HARV. L. REV. 360. Mr. Parry gives at length the testimony of many alienists in its favor.

It may be conceded that the rule advocated would allow the defence of insanity in a large majority of the cases where justice requires it. There is however a view which more completely reconciles law and medical science, the argument for which Mr. Parry does not seem to answer adequately. According to this doctrine there should be no absolute test and the inquiry of the jury should not be limited to any particular phase of the disease. The fundamental question of responsibility is whether the act is the product of insanity without the coöperation of a guilty motive. The insanity may cause the act by blinding one to the distinction between right and wrong, or by overpowering the will and compelling one to do what he recognizes to be wrong. It may work in other ways as by perverting a man's nature so that, purely as a matter of disease, he deliberately and voluntarily does what he knows is wrong. There are said to be patients so afflicted in every hospital for the insane, and under the test proposed by Mr. Parry these men would be punished for their insane acts. Since the forms and manifestations of insanity are so varied, there can be no absolute test applicable to all cases. The courts may and should point out ways in which the insanity may have acted, leaving the man free from responsibility, but they ought not to limit the range of the inquiry to one or several tests. This view is not without support in the courts. *State v. Pike*, 49 N. H. 399. Mr. Parry, however, argues that definite rules are necessary for the guidance of jurors, who are almost inevitably ignorant of diseases of the mind. But after the jury have been given the general legal rule, the needed enlightenment on the question of scientific fact in the application of that rule to the particular case comes most properly and surely from the testimony of medical experts. The gain in having a sound and just rule to save all truly insane men from punishment outweighs any increased danger of the abuse of the defence.

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**CONTRACTS IN RESTRAINT OF TRADE.** — A brief but suggestive article as to the extent to which agreements restricting trade should be upheld appears in a recent periodical. "*Is a Contract in Restraint of Trade Sustainable as an Independent Contract?*" by Frederick H. Cooke, 35 Am. L. Rev. 836 (Nov.-Dec., 1901). The author contends that only such restraints should be sanctioned as are incidental to a larger contract, as of sale or employment.

He argues that the reason for the general rule invalidating agreements in restraint of trade is "the evil produced by the withdrawal of a capable member of society from active production;" that this evil may at times be tolerated when, by the transfer of business, another member of society is given the opportunity, new or enlarged, of engaging in the same line of activity, but not otherwise; that the independent contract involves no such transfer, and consequently is not to be sustained.

Two criticisms may be passed upon the author's position, without denying his conclusion. First, he waives all discussion as to whether the restrictive agreement tends to suppress competition. The established test to be applied to such an agreement is that of "reasonableness;" the restraint must be no larger than is necessary for the fair protection of the parties and consistent with the interests of the public. *Nordenfelt v. Maxim, etc., Co.*, [1894] A. C. 535. From the standpoint of public interest, at least, it is clearly a material question whether or not the restraint will operate to suppress competition and foster monopoly. Secondly, the author apparently assumes that independent contracts necessarily involve no transfer of business. But where necessities form the subject-matter of the agreement, it is plain that transfer of business to others must ultimately follow, though not necessarily to the covenantee alone. In other agreements as well, it may result as a natural consequence. If, then, the question of monopoly were waived, and a decisive reason for the author's position were, as he suggests, the transfer of business, it seems that at least some independent contracts would stand on the same footing with ancillary agreements; and the distinction urged would have but little weight.

But though the distinction can hardly rest on the ground suggested, it may be conceded that it is not without force. Public policy demands that a covenant ancillary to the conveyance of a business should, if reasonable, be enforced; otherwise the whole contract for the sale of a business and its good-will might prove worthless. The independent agreement, however, is supported by no such consideration; and frequently its obvious purpose is to suppress competition. This, it seems, is the basis of the distinction. The question of monopoly, far from being immaterial, is of clearest importance.

That the distinction suggested is not without recognition is apparent from a recent Alabama case. *Tuscaloosa Ice Mfg. Co. v. Williams*, 28 So. Rep. 669. To the same effect is a *dictum* in *More v. Bennett*, 140 Ill. 69. See also 2 BEACH, CONT., § 1575. In some instances, however, though rarely, the independent agreement has been sustained. *Leslie v. Lorillard*, 110 N. Y. 519.

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RELIGIOUS BELIEF AS A DEFENCE FOR FAILURE TO PROVIDE MEDICAL ATTENDANCE. — The legal responsibility of one who substitutes in place of regular medical attendance a mode of treatment for illness prescribed by a religious body is a subject of growing importance. It is of interest therefore to find the criminal liability of parents for a failure under such circumstances to provide medical attendance for infants treated in a recent article by John H. S. Lee, 9 Am. Law. 565 (Dec. 1901). Certain preliminary questions are shown by the author to be well settled. It is established that religious belief is not a defence for failure to perform a legal duty, and that there is a legal duty at common law resting on a parent to furnish necessities to his child. Proper treatment and care when the child is ill are clearly necessities, and such treatment might often include medical attendance.

This series of propositions, however, merely leads up to the real difficulty of the subject. It is obvious that a parent is not always guilty of manslaughter for the death of a child resulting from failure from religious scruples to provide medical attendance. Mr. Lee makes criminal responsibility turn on the question "whether the defendant did in the particular instance act as a reasonably prudent man in like circumstances should have acted." This rule fails to recognize that the question is of the existence of the guilty mind, of wilful or grossly negligent omission to perform the duty, without which there can be no criminal liability at common law. The difficulty in these cases is that men who have done the best they knew cannot be held criminally liable. The plea of religious belief does not set up a defence for the violation of the duty, it negatives its very violation. The parent may make an ignorant and foolish mistake, but if he exercises his best judgment for the good of the child, he cannot be held guilty of culpable homicide. In such a case he would have no intention to avoid the performance of his duty, but would rather have a desire to perform it in the

wisest way. *Regina v. Wagstaffe*, 10 Cox C. C. 530. Theories, however, may be so absurd that they cannot be considered to be honest beliefs. It is hard to believe a man sincere in withholding food from an infant, or in confining the treatment of a severed artery to prayer. But that is an argument for the jury on the question of good faith. If it is desirable that the conscientious holders of perverted views should not be allowed to injure others by practising on them, the difficulty should be met by statutes. The Statute 31 & 32 Vict., c. 122, s. 37 imposed a positive duty on parents to provide medical attendance for their infant children, and under this statute religious conviction has been held no defence. *Regina v. Downes*, 13 Cox C. C. 111. Apart from such statutes the test is the good faith of the parent in attempting to fulfil the common law duty of care.

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**FEDERAL EQUITY PROCEDURE.**—A Treatise on the Procedure in Suits in Equity in the Circuit Courts of the United States including Appeals and Appellate Procedure. By C. L. Bates. Chicago: T. H. Flood and Company. 1901. 2 vols. pp. lxii, 599; 810. 8vo.

This is an excellent work upon an important, technical, but practical subject. In most of our states, practice acts or codes have so modified the original system of equity procedure developed by the English chancellors that it has now become hardly recognizable. But in the United States courts, at the beginning of their history, the English chancery system was made the basis of equity procedure, and now through the later adoption of the English Chancery Orders of 1842 by these courts, this highly developed English system, only slightly modified, persists in our circuit courts perhaps even to a greater extent than in England itself. This procedure is, or should be, uniform throughout all our federal courts. A book, therefore, of the scope of the present one must prove of great value to all practitioners in federal equity, especially since this subject has before been hardly treated adequately.

The author deals with his theme both broadly and minutely. He outlines the basis of federal equity jurisdiction, and carefully traces the sources of the system of procedure. Then each step in the bringing and prosecution of a suit, including appeals, is taken up with great detail, and all the many questions that may arise during any stage of the proceedings are thoroughly investigated. At each step the English chancery procedure with its modifications in this country is indicated, and the authority for every rule laid down is brought back to the United States Statutes, the Equity Rules of the Supreme Court, or the English Chancery Orders of 1842. The result of this method is a thorough and reliable text-book which brings this great complex system of adjective law into a form readily accessible to a busy lawyer, thus considerably simplifying his labors within this field. Nor is the book without interest to the student, for it shows the survival of an interesting and highly developed form of pleading and practice in its practical modern development.

This book will of necessity be chiefly valuable for reference purposes and its value in this direction is greatly increased by an extensive appendix, containing the Constitution of the United States, annotated, the various Federal Judiciary Acts, the Equity Rules of the Supreme Court, the English Orders in Chancery of 1842, the rules of certain other federal courts, and a thorough selection of forms in equity. This brings together much important material which is not otherwise readily accessible, and, together with the complete series of indexes, makes the whole book a welcome addition to the list of working law books.

W. H. H.

HANDBOOK OF ADMIRALTY LAW. By Robert M. Hughes. St. Paul: West Publishing Co. Hornbook Series. 1901. pp. xvii, 503. 8vo.

The author purports in this work to meet the need for an elementary treatise on marine law, to be of service to students as well as to the general practitioner who does not aim to specialize in this subject. After a brief outline of the origin and history of maritime law, and of its development and status in this country, the tests of jurisdiction are briefly given in the two main subdivisions, cases of contract and cases of tort, followed by a treatment of the various maritime contracts: supplies, repairs, and other necessities; bottomry and respondentia; general average; marine insurance; affreightment and charter-parties; mariners' contracts; stevedores' contracts; pilotage, towage, etc. Salvage, although admittedly not generally based upon a contractual claim, is considered under contracts, as is the effect of the Harter Act (1893). After a discussion of admiralty jurisdiction over torts the author treats of the rights of action in admiralty for injuries causing death. In connection with collisions, steering and sailing and other rules are considered, with a chapter on damages in collision cases. The rights and liabilities of shipowners, both prior to and after the Act of Congress limiting their liability, is dealt with, and after a statement of the relative priorities of maritime claims the body of the work closes with a brief outline of admiralty pleading and practice in this country. The appendix gives the Congressional statutes regulating navigation, evidence in the Federal courts, and suits *in forma pauperis*, together with the Admiralty Rules of Practice promulgated by the Supreme Court.

An exhaustive treatise upon maritime law would be of decided value. But the author has not attempted, nor does the work afford, anything more than a statement of general principles usually in the form of summaries of, or extracts from, important decisions. In but two or three instances are disputed questions thoroughly discussed, while these few discussions by no means exhaust the unsettled parts of this branch of the law. Although in the main the conclusions reached are sound, in several instances inaccuracies are to be found. Thus it is stated (p. 369), "This new appellate court (the circuit court of appeals) is the court of last resort in admiralty cases, except that it may certify to the Supreme Court for decision any questions as to which it may desire instruction, and except, also, that the Supreme Court may, by certiorari, bring up for review any case which it may deem of sufficient importance." In addition the Act seems to provide for appeals in admiralty, from the District Court to the Supreme Court, in five classes of cases. 26 U. S. Stat. 827, ch. 517, sects. 5-6. Again the statement (p. 10) that admiralty jurisdiction extends to "waters . . . entirely within the limits of a state and above tide water . . ." seems opposed to the cases cited by the author without criticism on the following page. *U. S. v. Burlington, etc., Co.*, 21 Fed. Rep. 331 (*semble*); *Strapp v. Steamboat Clyde*, 43 Minn. 192. The citation of apparently inconsistent cases, relying upon both as authority, illustrates the danger of an attempt to state elementary principles merely by summarizing cases. See pp. 181, 182; *The H. S. Pickands*, 42 Fed. Rep. 239; *The Strabo*, 90 Fed. Rep. 110. Yet in spite of these defects, and of the absence of a thorough collection of authorities, the work will doubtless be useful as an elementary text-book, and may prove helpful to lawyers through its collection of the different Federal Statutes and of the Admiralty Rules of Practice.

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A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES. By Thomas Carl Spelling. Second edition. Boston: Little, Brown & Co. 1901. 2 vols. pp. clxxii, 821; xxvii, 1073. 8vo.

This book aims to treat at length extraordinary remedies at equity and at law, covering injunctions, *habeas corpus*, *mandamus*, prohibition, *quo warranto*, and *certiorari*. The demand for a second edition is the best evidence of its value to lawyers. It does not profess to treat the underlying principles of these subjects nor to discuss the propriety or soundness of the various applications of these doctrines. Instead it purports to give an enumeration of the different circumstances under which these remedies have been sought and these principles

applied, while broad statements of very general rules of law serve to make its form that of a text-book rather than that of a digest. Naturally, when such a method has been adopted, the success of the work depends very largely upon the accuracy of the statements of the decisions and upon the arrangement of the subject-matter. In no other way than by actual use can this accuracy be fairly tested. If the lawyer is able to turn quickly to the line of cases which he has in mind and finds them reported with exactness, it will be a very useful manual to him, and the fact that the book has found a place for itself shows that the author has done his work well. Such a book, however, can be of very little assistance to students and this second edition makes it no more so. Indeed the second preface addresses itself to the lawyer whose client is not willing to wait until he gets an education on the various subjects which are treated. Such a lawyer will certainly not disappoint his client if he uses Mr. Spelling's book.

Very few changes have been made in this second edition. Some late cases seem to have been added, but not enough to add appreciably to the value of the book. The author, in the preface, speaks of recent important extensions of the jurisdiction to grant the writ of injunction, but a comparison of the two editions give little evidence of any such extensions since the first edition. Still fewer important changes can be found in the extraordinary remedies at law. The total lack of discriminating comment upon such recent extensions as are noted makes whatever added value there may be seem very slight, and there is little danger that it will wholly supplant the first edition.

A very sensible feature of this new edition, however, is that the section numbering of the first edition has been preserved. This makes it unnecessary to state the edition from which a citation is made.

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A BRIEF ON THE MODES OF PROVING THE FACTS MOST FREQUENTLY IN ISSUE OR COLLATERALLY IN QUESTION ON THE TRIAL OF CIVIL OR CRIMINAL CASES. By Austin Abbott. Second and enlarged edition by the publishers' editorial staff. Rochester: The Lawyers' Coöperative Publishing Co. 1901. pp. xxii, 653. 8vo.

The author's task, outlined in the title, is really one of giving suggestions. Out of such points as his experience has shown to be of widest application he has constructed what must prove a ready manual for trial lawyers. The particular subjects of proof, arranged alphabetically, serve as chapter-headings, and the paragraphs of the text, stated first generally, are developed by summaries of cases in digest form averaging half a page in length.

The value of such a book may be fairly measured by the adequacy with which it treats important practical topics like presumptions, burden of proof, and judicial notice, both because its scope includes these more properly than does that of a treatise on evidence, and because the confusion which blurs them in practice should be removed by accurate text-book definition. In the first edition, however, nothing more was attempted than to state carefully each separate proposition which involved these subjects. The present editors often omit even this process of clarifying, and many pages, out of the larger share devoted in the new edition to these matters, are marred by the miscellaneous inaccuracies of reporters' head-notes. Little help, for example, can be found in the statement on page 19 that "It will be presumed that one who abandons land which he has been holding adversely held in subordination to the title of the true owner, but the burden of proving abandonment or interruption of adverse possession is upon the adverse party."

As an authority the book must now stand as if anonymous, for the editors have doubled the original size and generally failed to indicate which passages are theirs and which the author's. They call attention, however, on page 162, to a departure that they take from the latter's views, where they distinguish, for purposes of construction of writings, between patent and latent ambiguities. In this they are singularly retrogressive. See THAYER, PRELIM. TREAT. EV., 422-425; *Meyers v. Maverick*, 28 S. W. Rep. 716 (Tex.). Except in the respects suggested, however, the original work seems to have been successfully expanded.



**BAILMENTS — A COMMENTARY ON THE LAW OF CUSTODY AND POSSESSION.**

By Wyatt Paine. London: Sweet & Maxwell, Limited. 1901. pp. lxxxvi, 550. 8vo.

If legal literature is not enriched by the addition of another book on bailments to the works of Story and Sir William Jones, the fault lies rather in the nature of the thing attempted than in the industry of the author. The impossibility of writing in one volume a satisfactory treatise on so comprehensive a subject is apparent. The book is necessarily little more than a bare statement of rules of law. Here and there the reader is refreshed by an expression of personal views, as in the section on the responsibility of bankers for the safe custody of the valuables of their customers, pp. 19-23. But in general one must be content with quotations from decided cases and these occupy an unfortunately large portion of the book. For the same reason many important questions which might well form the subject of chapters are either passed over with a word or omitted altogether: for example, the real nature of the bailor's right against the bailee in possession. Of those subjects, however, with which the work deals, the treatment is clear and generally accurate. Although Lord Holt's classification of bailments into six sorts is adopted and adhered to throughout, the arrangement is not always logical. The reader is at times confused by the treatment of topics under section headings with which they seem to have no connection. One wonders why matters of agency and the duties of lodging-house keepers should be dealt with in a section purporting to treat of attornment. Again, the law governing trustees and executors, pp. 71-80, falls entirely without the jurisdiction of this subject and this is also true of much that is included in the sections on Hire of Work and Labour, pp. 155-180, Stoppage *in Transitu*, pp. 220-232, and Bills of Lading, pp. 361-384. The chief merit of the book lies in the liberal citation of authority, including the most recent decisions. The fact that approximately 2000 cases are cited and 200 statutes referred to, together with the admirable plan of first stating the common law and then the statutory modifications, assures for this work a useful future among English practitioners. Added value is given by an appendix containing a collection of Australasian and Indian cases and statutes with brief comments thereon.

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**A TREATISE ON INTERNATIONAL PUBLIC LAW.** By Hannis Taylor. Chicago: Callaghan & Co. 1901. pp. lxxvi, 912. 8vo.

**CROMWELL ON FOREIGN AFFAIRS, together with Four Essays on International Matters.** By F. W. Payn. London: C. J. Clay & Sons. 1901. pp. viii, 167. 8vo.

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## GIFTS FOR A NON-CHARITABLE PURPOSE

A DEVISE or bequest for a charitable purpose is valid although there be no definite *cestui que trust*. The State, through the attorney-general, will compel the trustee, or, if need be, will appoint a trustee, to carry out the purpose.

Charities offer an exception to the general rule that every trust without a definite *cestui que trust* is void. When there has been an attempt to create such a trust by will, and it is clear that the trustee was not intended to hold beneficially, there is a resulting trust for the heir, next of kin, residuary devisee, or residuary legatee of the testator, as the case may be. The court cannot carry out or protect the trust which the testator has tried to create, and so it gives the property to the person representing the testator, leaving it to him to carry out the purpose if he sees fit.<sup>1</sup>

In the leading case of *Morice v. Bishop of Durham*, Sir William Grant puts the doctrine thus : —

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<sup>1</sup> *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 521; *James v. Allen*, 3 Mer. 17; *Ommanney v. Butcher*, T. & R. 260; *Vezey v. Jamson*, 1 S. & St. 69; *Fowler v. Garlike*, 1 Russ. & M. 232; *Williams v. Kershaw*, 5 Cl. & F. 111, n.; *Ellis v. Selby*, 1 Myl. & Cr. 286; *Stubbs v. Sargon*, 2 Keen 255, 3 Myl. & Cr. 507; *Harris v. Du Pasquier*, 26 L. T. R. 689; *Buckle v. Bristow*, 10 Jur. N. S. 1095; *Leavers v. Clayton*, 8 Ch. D. 584; *In re Nottage*, [1895] 2 Ch. 649; *Chamberlain v. Stearns*, 111 Mass. 267; *Nichols v. Allen*, 130 Mass. 211; *Adye v. Smith*, 44 Conn. 60; *Holland v. Alcock*, 108 N. Y. 312; *Taylor v. Keep*, 2 Brad. 368; *Stewart v. Green*, Ir. R. 5 Eq. 470; *Browne v. King*, 17 L. R. Ir. 448; *In re Cullimore's Trusts*, 27 L. R. Ir. 18. See *McHugh v. McCole*, 97 Wis. 166.

"There can be no trust, over the exercise of which this court will not assume a control ; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of ; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favor the court can decree performance."<sup>1</sup>

Professor Ames has an interesting article on "The Failure of the 'Tilden Trust.'"<sup>2</sup> With his comments on the objectionable character of the New York statutes touching charities (now happily repealed),<sup>3</sup> I agree ; but he goes on to disapprove of the doctrine of *Morice v. Bishop of Durham*. He admits that that case "has never been directly impeached, either in England or this country," but he contends that it is unsound in theory, and that, in contradiction to it, "there are several groups of cases, undistinguishable from it in principle." His view is that although a trustee cannot be compelled to carry out a trust for an indefinite non-charitable object, and although, if he refuse to carry it out, there will be a resulting trust, yet, if he be willing to carry it out, the court should not interfere, at the instance of the testator's heir or next of kin, to prevent him.

"Where the will of the testator," he says, "can be fulfilled, equity [according to the doctrine of *Morice v. Bishop of Durham*], by interfering, defeats his will and thus produces the unjust enrichment of the testator's representative at the expense of the intended beneficiary."<sup>4</sup>

The doctrine in question undoubtedly produces the enrichment of the testator's representative ; but is such enrichment unjust ?

Let us, in the first place, look at the matter *inter vivos*. Suppose A. transfers certain property to B., and directs that B. shall employ it for such lawful purposes, not beneficial to B., as B. may see fit, there being no element of contract in the case.<sup>5</sup> If B. goes on and delivers the property, the persons who receive it get, undoubtedly, a good title ; but suppose, before B. thus deals with the property, A. demands it back. Will the court require B. to return it ; or can B. refuse, saying, "I am going to spend it as you directed,

<sup>1</sup> 9 Ves. 399, 404, 405.

<sup>2</sup> 5 HARV. L. REV. 389.

<sup>3</sup> By the N. Y. St. of 1893, c. 701, as ruled by the Court of Appeals, *Allen v. Stevens*, 161 N. Y. 122.

<sup>4</sup> 5 HARV. L. REV. 395.

<sup>5</sup> See *Gilman v. McArdle*, 99 N. Y. 451.

for lawful purposes not beneficial to myself"? Now, although it may be difficult to find many reported cases where such a question has arisen, there is a class of decisions directly in point. When a man assigns property to trustees to pay his debts, it is held in England that the creditors acquire no rights, until they consent to the assignment, and that, *therefore*, the assignment is revocable by the debtor.<sup>1</sup>

It is true that these cases have not been generally followed in the United States, but this is because it is held in this country that the creditors become *cestuis que trust* upon the execution of the deed, and have immediately vested rights.<sup>2</sup> The test always propounded in these cases is whether the conveyance has been made for the benefit of the settlor, so as to save him from the trouble or care or thought of doing things for himself, in which case it is revocable; or whether it has been made because he wishes to give third persons rights, in which case it is irrevocable.<sup>3</sup> Now, when a so-called trust has been created without any *cestuis que trust*, the purpose of its creation is almost necessarily the former; and, therefore, I believe that it can be revoked by the settlor. I know of no authority to the contrary. At any rate, such a doctrine has nothing unjust or inequitable about it.

The strongest argument against this view is drawn from analogy of powers. Mr. Ames puts it forcibly:—

"It may be objected that a devise might in this way become 'the mere equivalent of a general power of attorney'; but this objection seems purely rhetorical. Suppose a testator to give A. a purely optional power of appointment in favor of any person in the world except himself, with a provision that in default of the exercise of the power the property shall go to the testator's representatives, — or this provision may be omitted altogether, the effect being the same. Such a will is obviously nothing if not the mere equivalent of a general power of attorney. And yet the

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<sup>1</sup> See, for instance, *Walwyn v. Coutts*, 3 Mer. 707, s. c. 3 Sim. 14; *Garrard v. Lauderdale*, 3 Sim. 1; 2 R. & M. 451; *Acton v. Woodgate*, 2 M. & K. 492; *Smith v. Keating*, 6 C. B. 136; *Cornthwaite v. Frith*, 4 DeG. & Sm. 552; *Johns v. James*, 8 Ch. Div. 744; *In re Sanders' Trusts*, 47 L. J. Ch. 667; *In re Ashby*, [1892] 1 Q. B. D. 872; *Lewin, Trusts* (10th ed.), c. 20, sec. 2. The right to revoke such a trust can be exercised after the death of the settlor. *Garrard v. Lauderdale*, *Re Sanders' Trusts*.

<sup>2</sup> The cases will be found collected in *Burrill on Assignments* (6th ed.), §§ 257, 258.

<sup>3</sup> *Wilding v. Richards*, 1 Coll. 655; *Mackinnon v. Stewart*, 20 L. J. Ch. 49, 53; *Smith v. Hurst*, 10 Ha. 30, 47; *Johns v. James*, 8 Ch. Div. 744, 749, 750; *In re Ashby*, [1892] 1 Q. B. 872, 877, 878; *New's Trustee v. Hunting*, [1897] 1 Q. B. 607, 615, 616.

validity of this power would be unquestioned. If the power is exercised, the appointee takes. If it is not exercised, the testator's representative takes.

"Now vary the case by supposing that the testator imposes upon the donee of the power the *duty* to exercise it. Can the imposition of this duty furnish any reason for a different result? In fact, A., the donee of the power, has in this case also the option of appointing or not, since although he ought to appoint, no one can compel him to do so. Does it not seem a mockery of legal reasoning to say that the court will sanction the exercise of the power where the donee was under no moral obligation to act at all, but will not sanction the appointment where the donee was in honor bound to make it?"<sup>1</sup>

Most cases of powers can be readily distinguished, but let us take a case *inter vivos* similar to that suggested by Mr. Ames.

Land is conveyed to B. in trust for A. for life, on A.'s death as B. shall appoint, — save that he must not appoint to or for himself, — and, in default of appointment, the land to revert to the settlor. Here, as Mr. Ames says, we have an irrevocable power in B., and, without doubt, nothing the settlor can do will prevent B.'s making a valid appointment.

Suppose, however, land is settled on A. for life, and then on B. in trust for such persons, other than himself, as he may select. Mr. Ames says there ought to be no difference between this case and the former one, and that though the settlor attempts to revoke B.'s authority, yet B. can go on and make a selection which will be valid.

But, with submission, this is the distinction: The common law allows property to pass from one person to another on any future contingency (provided it is not too remote) and the contingency may be a nomination by a third person. But the common law will not allow a right *in personam*, an obligation, to be created without two parties. It will not recognize a promisor without a promisee, a contractor without a contractee, or a trustee without a *cestui que trust*.

To this, I take it, Mr. Ames would answer: "Granting that there cannot be a trustee without a *cestui que trust*, and that the settlor has attempted to impose a duty upon B. which cannot be enforced, yet that will not prevent B. from being the donee of an irrevocable power."

But is not the reply this?

It is a matter of intention. Is B. a mandatary of the settlor?

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<sup>1</sup> 5 HARV. L. REV. 395, 396.

That is, is he an agent of the settlor to act for him and on his behalf? Or is it contemplated that he shall have an independent authority, with power to act against the settlor's wishes and interests? If he is the former, then his mandate is revocable. The law does not allow of irrevocable mandates.<sup>1</sup> If he is the latter, then his power is irrevocable.

Now, in the first case supposed above, the case of the power, it is clear that B. is to have an entirely independent authority. The settlor has said how the property shall go, but B. has the right, at his mere will or whim, against every wish or interest of the settlor, to change the direction. This is said plainly on the face of the settlement. There is a definite *cestui que trust* with a power in B. to substitute another *cestui que trust*.

In the second of the supposed cases, the case of the trust, the use of the word "trust," the absence of any gift over, the absence of any named person who is to take or who may be deprived of the property, show an intention on the part of the settlor to employ B. as his agent to dispose of the property, and we have here an instance of a mandate. I do not say that this construction of the transaction is required as a logical necessity: but I do say that it is a perfectly reasonable, equitable, and fair construction.

Let us now pass to cases arising after death. Suppose such a trust as we have been considering, where there is no *cestui que trust*, has been created by settlement, and that the settlor dies. Does the right of revocation survive to the heir or executor? What rights shall survive and what not is matter of rather arbitrary law, but considering the current of legislation and decision, it is safe to say that the present policy of the law is that all rights which concern only property shall survive. Certainly there is nothing inequitable or unjust in such a policy. As noted above, when property has been given to a person in trust to pay creditors, the trust can be revoked after the death of the creator of the trust.<sup>2</sup>

But the case which ordinarily occurs in practice arises when the trust is created by will. Here there is no question of the survival of an interest which existed before the death of the testator. The trust or mandate and the power of revocation, if it exists, both come into being on the death of the testator. But, both in the settlement and in the will, there is the same attempt to create a

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<sup>1</sup> Blackstone v. Buttermore, 53 Pa. 266; Walker v. Denison, 86 Ill. 142; Chambers v. Seay, 73 Ala. 372.

<sup>2</sup> Garrard v. Lauderdale, 3 Sim. 1; s. c. 2 R. & M. 451; Re Sanders' Trusts, 47 L. J. Ch. 667.

legal duty without a legal right, which the law does not allow. It is not the case of the donee of a power where the testator has named a devisee and given a third person the power to substitute another devisee at his own option ; but it is the case of a mandate to carry out the wishes of a testator and to act for him instead of his acting for himself. Whether the power of revoking this mandate, as it would exist in the settlor upon a transaction *inter vivos*, shall exist in the heir or personal representative of the testator, or, in other words, whether a mandate created by will shall be irrevocable, though a mandate created by deed is not, is a matter which might conceivably be decided either way. But the analogy of the law is that any arrangement which gives the settlor certain rights, when it is made *inter vivos*, will, when it is made by will, give the same rights to the heir or personal representative of the testator. Thus, if land is devised on a condition subsequent, the heir has the right of entry.

The law will not allow a man in his lifetime to create a situation where the legal title is in A. and the beneficial interest is in no one. If such transaction is regarded as a trust, it is void ; if it is regarded as a mandate, it is revocable. It is not unjust or against public policy for the law to deny a man the power to create a situation after his death which it denies him the power to create during his life.

It may be said that there is a distinction between the creation of a trust with indefinite *cestuis* by will and its creation by deed, in this : When such a trust is created *inter vivos*, no one, except the settlor, has any reason to count on its being carried out, and therefore no one except the settlor has any rights under it ; even those who disapprove of the doctrine of *Morice v. Bishop of Durham* cannot say that its application to settlements is in any way *unjust* ; but the testator does expect that the trust created by his will is to be carried out, and to allow this expectation to be defeated by the action of the heir or next of kin, when the trustee is prepared to carry it out, is unjust. There is nothing unjust in allowing a man to defeat his own schemes, but it is unjust to allow one man's schemes to be defeated by another.

But this, it is submitted, overlooks the fact that there is no injustice in the law restraining, by general rules, the power of a man to say what shall be done with his property after his death. The law does allow a man on his death to transfer to others the rights which he himself has had, but it says that the mandates and agencies which he has given shall cease and that he shall



not create new ones. Agents without a principal, agents whose principal is a dead man, it will not allow, and in this there seems nothing unjust.

I repeat that I am not claiming that the doctrine of *Morice v. Bishop of Durham* is a legal necessity; but I submit that it is reasonable, equitable, and in accordance with the analogies of the law; and that there is good reason why, as Mr. Ames says, *Morice v. Bishop of Durham* "has never been directly impeached, either in England or in this country."

To the doctrine of *Morice v. Bishop of Durham*, there are some real and some supposed exceptions.

I. *Charities*. Gifts in trust for charitable uses are valid, although no definite *cestui que trust* be named. This is an exception in form only. The State, through the attorney-general, enforces these trusts.

II. *Funeral Expenses*. From the necessity of the case, an executor or administrator can pay the funeral expenses of the deceased; and although no one can compel him to carry out the directions of the will as to the testator's burial, yet, if he does carry them out, the courts will protect him from claims on the part of heirs, next of kin, or residuary legatees.

III. *Monuments*. A. *Erection*. A monument to the deceased or over his grave is esteemed part of his funeral expenses. "It stands on the same footing as an expensive funeral,"<sup>1</sup> and (if the rights of creditors are not interfered with) an executor will be allowed to follow the directions of his testator,<sup>2</sup> although they be of the most extravagant character. In *Detwiller v. Hartman*,<sup>3</sup> the testator directed his executor "to purchase a burial plot of ground 100 feet square in the Easton cemetery, and cause to be erected thereon a granite monument, the cost not to exceed \$50,000 nor less than \$40,000."<sup>4</sup>

But in a few cases the rule has been extended so as to allow the erection of monuments to persons other than the deceased. When an executor is directed to place monuments on a family burial ground where the testator directs or expects that he will himself be buried, the cost of such erections may come under a liberal interpretation of funeral expenses. Such was the case in

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<sup>1</sup> *Mellick v. Asylum*, Jac. 180, 184.

<sup>2</sup> See *Trimmer v. Danby*, 25 L. J. Ch. 424, 427.

<sup>3</sup> 37 N. J. Eq. 347.

<sup>4</sup> Cf. *Emans v. Hickman*, 12 Hun 425; *Bainbridge's Appeal*, 97 Pa. 482.

Mitford *v.* Reynolds ;<sup>1</sup> Wood *v.* Vandenberg ;<sup>2</sup> Fite *v.* Beasley ;<sup>3</sup> Cannon *v.* Apperson ;<sup>4</sup> Ford *v.* Ford.<sup>5</sup>

In Gilmer *v.* Gilmer,<sup>6</sup> a bequest for the erection of monuments to the memory of "Gen. Stonewall Jackson" and Colonels Cobb and Bartow was held valid ; but these monuments were not funereal, and the ground for supporting the bequest must be that the erection of a monument to a distinguished public man is a charitable use.<sup>7</sup>

There are no cases in the United States where trusts for monuments to private persons, such monuments having no connection with the interment of the testator, have been allowed. There are two such cases in England. The first is Masters *v.* Masters.<sup>8</sup> A testatrix left £200 for a monument to her mother. The validity of the legacy was not questioned. The only point discussed was whether it should abate proportionately with the other legacies, some of which were for charities. "It was objected that the £200, given for a monument for the mother, ought not to abate in proportion, this being a debt of piety to the memory of her mother, from whom the testatrix received the greatest part of her estate. And to this the court (Sir Joseph Jekyll, M. R.) inclined, but however reserved that point." So reads the report ; but according to Mr. Cox's note *in loco*, the decree declares that the "legatees and charities (except the £200 for the monument) are to abate in proportion." But as we shall see in the next paragraph, at the time of this case, and for many years after, even trusts for the repair of monuments were held to be charitable, and the assumption in Masters *v.* Masters that the legacy was valid is in line with that doctrine and was to be expected.<sup>9</sup> The other case is Musset *v.* Bingle.<sup>10</sup> A testator directed his executors to apply £300 in erecting a monument to his wife's first husband, and also to invest £200, and apply the interest in keeping up the monument. It was admitted that the latter direction was bad ; the question argued was whether the former direction was good. Hawkins, V. C., said "that the direction to the executors was a perfectly good one, and one which they were ready to perform, and

<sup>1</sup> 16 Sim. 105 ; 1 Ph. 185, 706.

<sup>2</sup> 6 Paige 277.

<sup>3</sup> 12 Lea 328.

<sup>4</sup> 14 Lea 553, 590.

<sup>5</sup> 91 Ky. 572.

<sup>6</sup> 42 Ala. 9.

<sup>7</sup> Cf. Smith's Estate, 5 Pa. Dist. Ct. 327 ; but see *Re Jones*, 79 L. T. R. 154.

<sup>8</sup> 1 P. Wms. 421 (1718).

<sup>9</sup> Cf. "Concerning the building or erecting of tombs, sepulchers, or monuments for the deceased . . . is the last work of charity that can be done for the deceased."

3 Inst. 202.

<sup>10</sup> Reported only W. N. (1876) 170.

it must be performed accordingly." This meagrely reported case seems to be the only authority at the present day for sustaining a trust for a monument in a case where the trust cannot be supported, either as a charity or as coming within funeral expenses.

*B. Repairs.* Trusts for the perpetual repair of tombs and monuments were originally held to be charitable; bad, if they contravened the Mortmain Act; but otherwise, good.<sup>1</sup> In 1815 Lord Ellenborough in *Doe d. Thompson v. Pitcher*<sup>2</sup> took a distinction between a monument to the testator himself and a monument to a third person. He said, with reference "to a trust (by deed) for keeping up a tomb. It does appear, I think, to be a charitable use in part and in part not. As far as concerns the grantor's own interment it is not, but inasmuch as it is for her family, it may be so considered."<sup>3</sup> This distinction was adopted by Mr. Jarman in his *Treatise on Wills*, and was continued by him down to the third edition (1861).<sup>4</sup> In *Jones v. Mitchell*,<sup>5</sup> a legacy of £60 to repair a family tomb passed without question; and in *Baker v. Sutton*,<sup>6</sup> trusts to repair tombs were held within the Mortmain Act. But in *Lloyd v. Lloyd*,<sup>7</sup> it was held that a trust to repair a tomb, although not within the Mortmain Act, was invalid, and this decision has been constantly and uniformly followed in England.<sup>8</sup> The later English doctrine has been followed or approved in most of the American cases.<sup>9</sup> The older doctrine that a trust to repair a tomb was valid seems to have been adopted with-

<sup>1</sup> *Durour v. Motteux*, 1 Ves. Sen. 320 (1749). See *Gravenor v. Hallum*, Amb. 643 (1767) (*cf.* notes 4 and 7 to Blunt's edition of Ambler; and Boyle on Charities 46); *Blackshaw v. Rogers*, cited in 4 B. C. C. 349; Boyle, 47 (1779).

<sup>2</sup> 3 M. & S. 407.

<sup>3</sup> But *cf.* s. c. on a second ejectment, 6 Taunt. 359, 370; 2 Marsh. 61, 71; Boyle 48; Tyssen, Char. Bequests, 78.

<sup>4</sup> Jarman, 3d ed. 194.

<sup>5</sup> 1 S. & St. 290 (1823).

<sup>6</sup> 1 Keen 224 (1836).

<sup>7</sup> 2 Sim. N. S. 255 (1852).

<sup>8</sup> *Rickard v. Robson*, 31 Beav. 244; *Fowler v. Fowler*, 33 Beav. 616; *In re Rigley's Trusts*, 36 L. J. Ch. 147; *Hoar v. Osborne*, L. R. 1 Eq. 585; *Fisk v. Atty.-Gen.*, 4 Eq. 521; *Hunter v. Bullock*, 14 Eq. 45; *Dawson v. Small*, L. R. 18 Eq. 114; *In re Williams*, L. R. 5 Ch. D. 735; *In re Birkett*, 9 Ch. D. 576; *In re Vaughan*, 33 Ch. D. 187. See *In re Tyler*, [1891] 3 Ch. 252; *Re Jones*, 79 L. T. R. 154; Tyssen, c. 7. *Contra, semble, In re Sinclair's Trust*, 13 L. R. Ir. 150.

<sup>9</sup> *Piper v. Moulton*, 72 Me. 155, 161, overruling *qu.* *Swasey v. Am. Bible Soc.*; *Bates v. Bates*, 134 Mass. 110; *Coit v. Comstock*, 51 Conn. 352; *Kelly v. Nichols*, 17 R. I. 306; *Matter of Fisher*, 2 Connoly 75; *Trustees of M. E. Church of Wells v. Gifford*, 5 Pa. C. C. 92; *Johnson v. Holifield*, 79 Ala. 423. See *Knox v. Knox*, 9 W. Va. 124.

out discussion in *Gafney v. Kenison*.<sup>1</sup> Legislation authorizing the establishment of such trusts is common in the United States.<sup>2</sup>

IV. *Masses*. In England a devise or bequest for the saying of masses for the soul of the testator or of others is illegal, as for a superstitious use, and so no question as to its coming within the doctrine of *Morice v. Bishop of Durham* arises.<sup>3</sup> Generally, in America such devises or bequests are good charitable trusts, and for that reason *Morice v. Bishop of Durham* has no application.<sup>4</sup> In New York such gifts, though considered charitable, were, under the provisions of the Revised Statutes (now happily repealed), held bad for want of a specific legatee.<sup>5</sup> In *Festorazzi v. St. Joseph's Catholic Church*,<sup>6</sup> such a bequest was held not charitable, and therefore void. This was in accordance with *Morice v. Bishop of Durham*.

The Irish cases call for special attention. In *Commissioners v. Walsh*,<sup>7</sup> a bequest for the saying of masses for the testator's soul was held good. The decree included the bequest as among "charitable uses and purposes." This case was followed in *Read v. Hodgins*.<sup>8</sup> In *Brennan v. Brennan*,<sup>9</sup> such bequests were spoken of as "charitable bequests." There was no discussion. In *Bradshaw v. Jackman*,<sup>10</sup> Porter, M. R., held "that a bequest for masses was not in itself illegal."

In *Atty.-Gen. v. Delaney*,<sup>11</sup> it was decided that such a bequest was not "for any purpose *merely* charitable" within the exception of a statute<sup>12</sup> imposing a legacy duty. Pallas, C. B., in delivering his opinion, said,<sup>13</sup> in reply to the contention that such bequests must be "deemed charitable": "In my opinion, this is not the real question which we have to decide. We are bound down within much more narrow limits. Our province is confined to determin-

<sup>1</sup> 64 N. H. 354.

<sup>2</sup> *Jones v. Habersham*, 3 Woods 443, 470; s. c. 107 U. S. 174, 183, 184; *Bronson v. Strouse*, 57 Conn. 147; *Smith's Estate*, 5 Pa. Dist. 327. (As to *Hornberger v. Hornberger*, 12 Heisk. 635, see p. 529, *post*.)

<sup>3</sup> See cases collected in Tyssen, c. 5; and also *In re Fleetwood*, 15 Ch. D. 594, 609; and *Elliott v. Elliott*, 35 Sol. J. 206.

<sup>4</sup> *Schouler, Petitioner*, 134 Mass. 426; *Seibert's Appeal*, 18 W. N. C. (Pa.) 276. See *Rhymer's Appeal*, 93 Pa. 142; *Seda v. Huble*, 75 Iowa 429; *Elmsley v. Madden*, 18 Grant (U. C.) 386.

<sup>5</sup> *Holland v. Alcock*, 108 N. Y. 312. See *Gilman v. McArdle*, 99 N. Y. 451; *Vanderveer v. McKane*, 25 Abb. N. C. 105; *Estate of Howard*, 5 N. Y. Misc. 295; *Matter of Backes*, 9 N. Y. Misc. 504.

<sup>6</sup> 104 Ala. 327.

<sup>7</sup> 7 Ir. Eq. 34, n. (1823).

<sup>8</sup> Id. 17 (1844).

<sup>9</sup> Ir. R. 2 Eq. 321 (1868).

<sup>10</sup> 21 L. R. Ir. 12 (1887).

<sup>11</sup> Ir. R. 10 C. L. 104.

<sup>12</sup> 5 & 6 Vict. c. 82, sec. 38. <sup>13</sup> Ir. Rep. 10 C. L. 122.

ing whether the purpose in question is one merely charitable within the" said statute. And this decision was followed in *Perry v. Tuomey*.<sup>1</sup> In *Dillon v. Reilly*<sup>2</sup> the provision for the offering of masses was in the form of a condition upon a gift to individuals.

There is, however, a series of cases before Sullivan, M. R., and Chatterton, V. C., given in the note<sup>3</sup> in which bequests for masses have been held void. In the first of these cases (*Boyle v. Boyle*), the decision was placed squarely on the doctrine of *Morice v. Bishop of Durham*. But in the later cases the gifts were declared void because creating a perpetuity; and taking the word "perpetuity" in its primary sense of "inalienable interest," the reason was not incorrect, the gifts were bad because the property could not be alienated, and it could not be alienated because there was no one to alienate it.

After these cases came *Reichenbach v. Quin*.<sup>4</sup> Here the testatrix requested her trustees "to apply £100 towards having masses offered up in public in Ireland," for the repose of her soul and the souls of certain other persons. Chatterton, V. C., after stating the terms of the bequest, said: "I do not consider that there is any attempt here to create a perpetuity, and on that ground — and I wish it to be understood that on that point only I give a decision — I shall declare that the gift is valid."

The course of events was that Chatterton, V. C., at first, in *Boyle v. Boyle*, placed his decision on the true ground, the want of a definite *cestui que trust*, but afterwards gave (followed in this by Sullivan, M. R.,) as the ground of the decisions what was only an incident of the true ground, viz., inalienability, and then, when he thought that incident failed, he, without due care, assumed that all ground had failed for condemning the trust. The opinion was evidently not carefully considered. *Reichenbach v. Quin* is the only one of the cases on masses which contradicts *Morice v. Bishop of Durham*.

In *Small v. Torley*,<sup>5</sup> an annuity was given to a clergyman and his successors for 50 years upon a trust for the celebration of masses. The court held "that as an attempt to create a perpetuity it is void." And in *Brannigan v. Murphy*,<sup>6</sup> a bequest in trust to say masses was declared void as a perpetuity.

<sup>1</sup> 21 L. R. Ir. 480 (1888).

<sup>2</sup> L. R. Ir. 10 Eq. 152.

<sup>3</sup> *Boyle v. Boyle*, Ir. R. 11 Eq. 433 (1877); *Beresford v. Jervis*, 11 Ir. L. T. R. 128 (1877); *Kehoe v. Wilson*, 7 L. R. Ir. 10 (1880); *Morrow v. M'Conville*, 11 L. R. Ir. 236 (1883); *Dorrian v. Gilmore*, 15 L. R. Ir. 69 (1885).

<sup>4</sup> 21 L. R. Ir. 138 (1888). <sup>5</sup> 25 L. R. Ir. 388 (1890). <sup>6</sup> [1896] 1 Ir. 418.

There is a case mentioned by Mr. Ames as being in conflict with the doctrine of *Morice v. Bishop of Durham*, which may be mentioned as well here as anywhere. In *Gott v. Nairne*,<sup>1</sup> the testator, by a codicil to his will, gave £12,000 to trustees upon trust, as soon as conveniently might be, but nevertheless at the absolute discretion of the trustees, to invest the whole or part in an advowson, and until his son John should be presented to a benefice of £1000 a year, or should die, to present a fit person to the benefice, and subject thereto the trustees should hold the advowson in trust for John. Until such investment in an advowson, the £12,000 to be invested in certain securities, the income to be accumulated for 21 years, and (in case the advowson had not been purchased) after the 21 years to pay the income to the son or his executors or administrators, and if the son died or was presented to a benefice of £1000 a year, before the advowson was purchased, the £12,000 and the accumulations were to belong to John.

The £12,000 had been set aside and invested in securities, but the advowson had not been purchased. John brought a bill in equity praying that the fund should be transferred to him, whether he had or had not been presented to a benefice of £1000. The trustees demurred. The demurrer was sustained. That is, the court (Hall, V. C.,) held that the money was payable under the terms of the trust to the son John, upon certain conditions which had not been fulfilled. The plaintiff was claiming under the trust, there was no claim against the trust, and no question as to its validity. John, from his going into the Church, and from his being provided for in a codicil, seems to have been a younger son only.

V. *Animals*. In *Mitford v. Reynolds*,<sup>2</sup> a testator gave "the remainder" of his property, "after deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct to be preserved as pensioners, and are never, under any plea or pretence, to be used, rode or driven, or applied to labor)" for a certain object. The case was elaborately discussed on two points, — first, what was included in "the remainder" of the property, and, secondly, whether the object to which the remainder was given was a good charity. It was held that it was a good charity. No discussion whatever seems to have taken place on the validity of the direction as to the horses, but the report states that the order "made provision for the maintenance of the testator's horses; and on the death of them or either of them" there

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<sup>1</sup> 3 Ch. D. 278.

<sup>2</sup> 16 Sim. 105.



was to be liberty to apply.<sup>1</sup> In the later case, *In re Dean*, to be immediately referred to, North, J., speaking in his opinion of *Mitford v. Reynolds*, makes the following statement :—

“The order made on further consideration in that case has been produced from the Record Office during the hearing of the present case, and it contains a declaration that the provisions for the horses was good. It is clear there must have been evidence before the Court showing that at that time two only of the testator’s horses (he had died eleven years before) were living. Then provision was made for carrying over the sum of £1800 Consols to the fund for the maintenance of the horses, and directions were given for the application of the income, with liberty to apply, as to the whole or part of the fund, when the horses or either of them should have died.”<sup>2</sup>

But the important case is *In re Dean*.<sup>3</sup> A testator bequeathed his horses and dogs to his trustees, and charged his land with the payment to his trustees during 50 years, if any of the horses and dogs should so long live, of the sum of £750 annually. He declared that the trustees should apply said sum to the maintenance of said horses and dogs, and of their stables and kennels. He further declared that the trustees “shall not be bound to render any account of the application or expenditure of the said sum of £750, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion ;” that the horses should not be worked, but might be exercised ; and that neither the horses nor dogs should be sold. He also gave to the trustees for 50 years, if any of the horses or dogs lived so long, the stables and kennels inhabited by them.

The residuary legatee brought a proceeding in equity to obtain a declaration that the gift of £750 a year to the trustees was invalid, or, in the alternative, that the plaintiff was entitled to the balance of the £750 after making provision for the horses and dogs. North, J., in an elaborate opinion, held that the provision for the horses and dogs was not void. The grounds on which he went were the decisions in which bequests for building monuments had been sustained and the case of *Mitford v. Reynolds*, on which he commented at great length, and in which, he contended, the validity of the provision for the horses must have been considered by the court. The learned judge also held that any surplus of the £750 not required for the maintenance of the horses and dogs was not taken by the trustees beneficially, but went either to the de-

<sup>1</sup> 16 Sim. 120.

<sup>2</sup> 41 Ch. D. 559, 560.

<sup>3</sup> 41 Ch. D. 552 (1889).

visee of the land or to the heir; in the absence of the latter, he did not decide to which.

Morice *v.* Bishop of Durham was not referred to by the learned judge, nor does the inconsistency between the doctrine of that case and his own decision seem to have been present to his mind.

The correctness of Mr. Ames's statement that *In re* Dean is irreconcilable with the decisions of Sir William Grant and Lord Eldon seems to be indisputable. It is really the one important decision in conflict with Morice *v.* Bishop of Durham. We must choose between them, and it is submitted that it is not *In re* Dean that should be followed.<sup>1</sup>

VI. *Slaves.* Mr. Ames refers to another class of cases as in conflict with the doctrine of Morice *v.* Bishop of Durham.

"The distinction," he says, "between an illegal trust and a valid, though merely honorary trust, is well brought out by some decisions in the Southern States before the war. A bequest upon trust to emancipate a slave in a slave State was void, it being against public policy to encourage the presence of free negroes in a slaveholding community. But a bequest upon trust to remove a slave into a free State and there emancipate him was not obnoxious to public policy, and although the slave could not compel the trustee to act in his behalf, still the courts acknowledged the right of a willing trustee to give the slave his freedom in a slave State."<sup>2</sup>

But it is to be observed that in most of the slaveholding States the performance of such a trust could be compelled. In North Carolina such a trust was declared to be charitable;<sup>3</sup> and generally the right to sue for freedom was recognized as an exception to the general rule that a slave had no rights; and, either at common law or by virtue of a statute, a slave was allowed to appeal to the courts to enforce a testamentary direction for his emancipation, which was not contrary to public policy.

Thus a slave could offer for probate a will by which he was manumitted, or apply to the court to compel the executor to carry out a direction for emancipation. This appears to have been the law in Maryland, Virginia, South Carolina, Tennessee, and Arkansas.<sup>4</sup>

<sup>1</sup> Animals can be provided for by giving legacies to persons conditioned on the life or on the care of the animals. See *Fable v. Brown*, 2 Hill Ch. 378, 397.

<sup>2</sup> 5 HARV. L. REV. 400.

<sup>3</sup> *Cameron v. Commissioners*, 1 Ired. Eq. 436; *Thompson v. Newlin*, 6 Ired. Eq. 380; s. c. 8 Ired. Eq. 32, 43, 44. See also *Charles v. Hunnicutt*, 5 Call 311.

<sup>4</sup> *Fenwick v. Chapman*, 9 Pet. 461; *Peters v. Van Lear*, 4 Gill 249; *Patty v. Colin*, 1 Hen. & M. 519; *Redford v. Peggy*, 6 Rand. 316; *Dunn v. Amey*, 1 Leigh 465; *Paup v. Mingo*, 4 Leigh 163; *Nicholas v. Burruss*, 4 Leigh 289; *Anderson v. Anderson*, 1:



In Florida and Texas it is said that an executor would be compelled to carry out such a trust although the mode of exercising the compulsion is not stated.<sup>1</sup> There is nothing to indicate that the law is different in Kentucky.<sup>2</sup> Of the slave states (other than Louisiana, where the common law did not prevail) the state of affairs suggested by Mr. Ames could have arisen at most only in Georgia, Alabama, and Mississippi. And these are the three states to which Mr. Ames specifically refers.

In Mississippi, Buckner, C., in *Ross v. Duncan*,<sup>3</sup> in reference to these cases said: "A trust may be created which may be perfectly consistent with the law, and yet the law may have pointed out no mode of enforcement; still it would not interfere to prevent it, but would leave its execution to the voluntary action of the trustee." But in the Court of Appeal, where the decree of the Chancellor was affirmed,<sup>4</sup> the court referring to the case of *Frazier v. Frazier* in South Carolina say it raises the identical question with that before them, and that the South Carolina court "held the trust to be a valid one which the executors might be *compelled to execute*."<sup>5</sup> And when the same will was again before the Court of Appeals,<sup>6</sup> on a bill against the executors by the American Colonization Society, who had been directed by the will to superintend the removal of the slaves to Africa, the executors were ordered to deliver the slaves to the Society. The court say: "We need not now decide whether any remedy exists on the part of the slaves, if there had been no trustee under the will . . . but we take occasion to say, that in several of the states it has been held that the mere intention of the testator to emancipate, conferred a right to freedom, which, though it cannot be asserted in a court of law, may be enforced in a court of equity;" and they proceed to cite cases to that effect.

In Alabama came up the case of *Abercrombie v. Abercrombie*,<sup>7</sup>

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Leigh 616; *Phoebe v. Boggess*, 1 Grat. 129; *Reid v. Blackstone*, 14 Grat. 363; *Peter v. Hargrave*, 5 Grat. 12, 17; *Jincey v. Winfield*, 9 Grat. 708; *Susan v. Wells*, 3 Brev. 11; *Frazier v. Frazier*, 2 Hill Ch. 304; *Fisher v. Dabbs*, 6 Yerg. 119; *Hinklin v. Hamilton*, 3 Humph. 569; *Isaac v. McGill*, 9 Humph. 616; *Boon v. Lancaster*, 1 Sneed 577; *Isaac v. Farnsworth*, 3 Head 275; *Stephenson v. Harris*, 3 Head 728; *Bob v. Powers*, 19 Ark. 424.

<sup>1</sup> *Sibley v. Maria*, 2 Fla. 553; *Purvis v. Sherrod*, 12 Tex. 140.

<sup>2</sup> On the general question see Cobb, *Slavery*, c. 16.

<sup>3</sup> 5 Freem. Ch. 587, 603.

<sup>4</sup> *Ross v. Vertner*, 5 How. 305.

<sup>5</sup> The italics are those of the opinion.

<sup>6</sup> *Wade v. Am. Col. Soc.*, 7 Sm. & M. 663, 696, 697.

<sup>7</sup> 27 Ala. 489, 495.

where the same question was presented. The Supreme Court said : —

“It may be that the slaves themselves might not be able, by a suit, to enforce the trust ; but if it be so, in relation to which we express no opinion, it cannot affect its validity so far as the executor is concerned ; and if he was so regardless of duties which he had voluntarily assumed, and of the oath which he had taken to discharge them, as to fail in the faithful execution of the trust, the powers of the Court of Chancery, to which by his will he had submitted the administration, are amply sufficient to enforce it, and the rule which might operate to prevent the beneficiaries themselves from enforcing it by suit would have no application.”

But in the later case of *Hooper v. Hooper*,<sup>1</sup> which was not a suit for freedom, the court says that an executor will not “be compelled by the court, *at the instance and suit of the slave*, to carry him to the State to which the will directs him to be carried for the purpose of emancipation. The Court of Chancery will recognize the *authority* of the executor to execute the trust, and, if he *by his bill submits the administration* to that court, it might possess the power to enforce its execution, as a condition of giving its aid and relief to him. But the slave cannot enforce its execution by suit.” It is difficult to see how the filing of a bill by the executor can authorize the court to compel him to execute a trust to which he could not be compelled otherwise.

In Georgia<sup>2</sup> there is a like *dictum*. “Should the executor apply to the court for direction, as in the present case, the court will thereby acquire jurisdiction and decree the execution of the trust. And the same result would follow should the next of kin move in the premises.” It cannot be said that the slave cases in the Southern States furnish any great authority in favor of the validity of non-enforceable trusts.

A wise course, it is submitted, would have been to follow the judgment of that able judge, Chief Justice Ruffin, and consider all such testamentary provisions as charitable, and to be carried out so far as not forbidden by police enactments.

But perhaps the most satisfactory way of dealing with such provisions is to remember that the institution of domestic slavery was foreign to the common law and had to be incorporated in it as best it could be by notions drawn from the civil law ; that emancipation had always been a prominent topic in the civil law ; that if manumission was to be allowed, it was almost matter of necessity that

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<sup>1</sup> 32 Ala. 669, 673.

<sup>2</sup> *Cleland v. Waters*, 19 Ga. 35, 54.

slaves should have a right to petition for their freedom; and that from decisions on the subject of slavery it is dangerous to draw analogies to be applied in other branches of the law.

It may be fairly said that the only considered decision in conflict with the doctrine of *Morice v. Bishop of Durham* is *In re Dean*, where North, J., held that an executor might carry out a trust for animals.

Under the head of gifts to trustees for non-charitable, indefinite objects really also come cases where a gift, devise, or legacy is made to an unincorporated society or club. If the gift is in truth to the present members of the society, described by their society name, so that they have the beneficial use of the property, and can, if they please, alienate it, and put the proceeds in their own pockets, then there is a present gift to individuals which is good.<sup>1</sup> But if the gift is intended for the good not only of the present but of future members, so that the present members are in the position of trustees, and have no right to appropriate the property or its proceeds for their personal benefit, then the gift is invalid.<sup>2</sup> It is intended to be in trust for the society as such, which is a continuing entity in the contemplation of the donor, but which is not recognized by the law as having any standing in the courts.<sup>3</sup>

Those cases where gifts to trustees for non-charitable purposes have been held void suggest a question which at first sight seems rather alarming. Very many clubs or other institutions not charitable have property held by trustees. Are these trusts void, and cannot the trustees expend the income for the benefit of the club?

In answer to this question two suggestions can be made:—

*First:* The delivery of the property to the trustees is a good mandate, and the trustees can dispose of it in accordance with the

<sup>1</sup> *Cocks v. Manners*, L. R. 12 Eq. 574; *Old South Society v. Crocker*, 119 Mass. 1, 23; *Henrion v. Bonham*, O'Leary on Charities 90. [I have not seen this case. It is cited several times in the Irish Reports, e. g. *Stewart v. Green*, Ir. R. 5 Eq. 470, 485; *In re Delany's Estate*, 9 L. R. Ir. 226, 241, 244; *Morrow v. M'Conville*, 11 L. R. Ir. 236, 241.] *In re Delany's Estate*, 9 L. R. Ir. 226; *In re Wilkinson's Trusts*, 19 L. R. Ir. 531. See *Anon.*, 3 Atk. 277; *Brown v. Dale*, 9 Ch. D. 78; *Re New South Meeting House*, 13 Allen 497; *Coe v. Washington Mills*, 149 Mass. 543; *Swift v. Easton Beneficial Soc.*, 73 Pa. 362; *Burke v. Roper*, 79 Ala. 138; *Stewart v. Green*, Ir. R. 5 Eq. 470.

<sup>2</sup> *Thomson v. Shakespear*, Johns. 612; s. c. 1 DeG. F. & J. 399; *Carne v. Long*, 2 DeG. F. & J. 75; *Re Dutton*, 4 Ex. D. 54; *In re Sheraton's Trusts*, W. N. (1884) 174; *Stewart v. Green*, Ir. R. 5 Eq. 470; *Hogan v. Byrne*, 13 Ir. C. L. 166; *Kehoe v. Wilson*, 7 L. R. Ir. 10; *Morrow v. M'Conville*, 11 L. R. Ir. 236. See *In re Clark's Trust*, 1 Ch. D. 497; *Carbery v. Cox*, 3 Ir. Ch. 231.

<sup>3</sup> *Hogan v. Byrne*, 13 Ir. C. L. R. 166; *Morrow v. M'Conville*, 11 L. R. Ir. 236, 243.

mandate until the mandate is revoked. See *Coe v. Washington Mills*.<sup>1</sup>

*Second*: There is in most cases a promise, express or implied, on the part of the trustee to apply the property delivered to him for the benefit of the club, and he can be held on the contract, and the person delivering the property has a remedy for breach of contract.<sup>2</sup> When the money for the club is raised by subscription, there may be a contractual relation, not only between a subscriber and the trustee, but between the subscribers, which would prevent the withdrawal of a subscription.

But it seems that ordinarily a gift by will for a non-charitable club or society (not to be in the disposition for their own benefit of the immediate members) can be avoided by the heirs or next of kin of the testator. In such a case there is no contract.

In some cases in which the validity of a devise has in truth depended on whether it contravened the doctrine of *Morice v. Bishop of Durham*, the courts have said or suggested that it depended on whether a "perpetuity" was created.<sup>3</sup> Particularly is this so in Ireland.<sup>4</sup> And if we take "perpetuity" in its primary sense of "an inalienable interest," the expression is not incorrect. If there is no one who can alienate the beneficial interest, the beneficial interest is inalienable.

But in some of these cases the court speak as if the test of the validity of such devises was their violating or not violating the Rule against Perpetuities, where Perpetuity is used in its secondary sense of Remoteness. This it is submitted is incorrect. The vice in such devises is not that the interests of the *cestuis que trust* are too remote, but that there are no *cestuis que trust* at all.

In several instances the reference to the Rule of Perpetuity is slight. Thus :—

"The property comprised in the devise is therefore to be taken out of

<sup>1</sup> 49 Mass. 543.

<sup>2</sup> *Gilman v. McArdle*, 99 N. Y. 451.

<sup>3</sup> *Thomson v. Shakespear*, Johns. 612; s. c. 1 DeG. F. & J. 399; *Carne v. Long*, 2 DeG. F. & J. 75; *Cocks v. Manners*, L. R. 12 Eq. 574; *Re Dutton*, 4 Ex. D. 54; *In re Dean*, 41 Ch. D. 552; *Re Jones*, 79 L. T. R. 154; *Johnson v. Holifield*, 79 Ala. 423. See Tud., Char. (3d ed.), 57.

<sup>4</sup> *Stewart v. Green*, Ir. R. 5 Eq. 470; *Beresford v. Jervis*, 11 Ir. L. T. R. 128; *Ke-hoe v. Wilson*, 7 L. R. Ir. 10; *In re Delany's Estate*, 9 L. R. Ir. 226; *Morrow v. M'Conville*, 11 L. R. Ir. 236; *Dorrian v. Gilmore*, 15 L. R. Ir. 69; *In re Wilkinson's Case*, 19 L. R. Ir. 531; *Bradshaw v. Jackman*, 21 L. R. Ir. 12; *Reichenbach v. Quin*, Id. 138; *Armstrong v. Reeves*, 25 L. R. Ir. 325; *Small v. Torley*, 25 L. R. Ir. 388; *Brannigan v. Murphy*, [1896] 1 Ir. R. 418; *Webb v. Oldfield*, [1898] 1 Ir. R. 431.

commerce and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but for so long as ten of the members of the society shall remain. This seems to me a purpose which the law will not sanction as tending to a perpetuity."<sup>1</sup> "It would, I conceive, be an extreme stretch of the rule against perpetuity to hold that it applies to a gift of this sort."<sup>2</sup> "The bequest" to keep up a monument "is invalid as repugnant to the rule against perpetuities . . . a private trust cannot be created so as to operate the inalienability of property beyond the period prescribed by the rule."<sup>3</sup> "The gift there, if not charitable, must have failed, as being contrary to the rule against perpetuities."<sup>4</sup>

The following cases should be noted more particularly : —

*Morrow v. M'Conville* :<sup>5</sup> Here a testator directed the rent of property "to be applied to the use and benefit of the Roman Catholic convent" at L. Chatterton, V. C., held that the gift was not to the members of the convent as individuals, but in trust for a non-charitable community which was incapable of taking it, and that the gift was, therefore, void within the doctrine of *Morice v. Bishop of Durham* ; but he also held "that a gift, not charitable, to a religious community, including not only the existing members, but also all persons who should be, or become thereafter, members of it during a period capable of extending beyond the legal limits prescribed by the rule against perpetuities is void." The reason first above given for the invalidity of the gift is, I submit, the correct and sufficient reason.

*Bradshaw v. Jackman* :<sup>6</sup> In this case there was a bequest in trust for the community of a convent. Porter, M. R., said : —

"There are undoubtedly two senses in which the word 'community' may be used. It may mean the aggregate of the persons living in a particular place, or answering a particular description, at a given time. . . . Or it may mean the aggregate of the members of an order or institution from time to time, forever, or so long as it continues to exist. . . . In the latter sense, a gift which in its terms included in its objects persons not in existence, and who might not come into existence until a time beyond the legal limit, would be clearly void for remoteness and uncertainty, unless saved by being charitable. . . . In my opinion, there is nothing to

<sup>1</sup> *Per* Campbell, L. C., *Carne v. Long*, 2 DeG. F. & J. 75, 80, quoted with approval *per* Kelly, C. B., in *Re Dutton*, 4 Ex. D. 54, 58.

<sup>2</sup> *Per* Wickens, V. C., *Cocks v. Manners*, L. R. 12 Eq. 574, 586, quoted with approval *per* Chatterton, V. C., in *re* *Wilkinson's Trust*, 19 L. R. Ir. 531, 536.

<sup>3</sup> *Per* Clopton, J., *Johnson v. Holifield*, 79 Ala. 423, 424; *cf.* *Matter of Fisher*, 2 Connoly, 75, under the New York Statute.

<sup>4</sup> *In re* *Delany's Estate*, 9 L. R. Ir. 226, 233.

<sup>5</sup> 11 L. R. Ir. 236.

<sup>6</sup> 21 L. R. Ir. 12.

drive me to the meaning which would make the bequest err against the rule as to perpetuities."<sup>1</sup>

The Master of the Rolls held, that is, that the bequest was for the benefit of a class consisting of certain specific living persons, and was therefore good ; but that if the bequest had been for the benefit of a class which might comprise within its numbers persons not coming into existence till a remote time, it would have been bad, a proposition which is true enough ; but the real distinction in the intention of the testator is not between a gift to a class consisting of certain individuals, and a gift to a class consisting of other individuals, but between a gift to individuals and a gift to a society as a continuing entity, abstracted from any individuals, which last is not recognized by the law as having any standing in courts, being neither a corporation nor a charity.

*Armstrong v. Reeves* :<sup>2</sup> In this case a testator gave a legacy "to the Society for the Abolition of Vivisection, payable upon the receipt of the Treasurer for the time being ;" and he gave the residue of his estate "to the Society of Carlsruhe for the Protection of Animals, to be paid to the Treasurer for the time being of the said society." Chatterton, V. C., held that the gifts were charitable ; and also that even if they were not charitable they were valid, because there was no indication of "an intention that the gifts received by the society shall be applied in a manner exceeding the limits which the law prescribes with regard to perpetuity." The reason first above given was a valid and sufficient ground for sustaining the trust.

*Small v. Torley* :<sup>3</sup> A testator gave to A., "the present Roman Catholic clergyman officiating as superior" of a certain church, "or the clergyman filling that office at the time of my decease, and to his successors from time to time so officiating," an annual sum of £10 for fifty years, "in trust that he or his said successors during said period" shall have mass celebrated in said church for the repose of the souls of the testator and of his wife and parents. This gift was held to be bad as a perpetuity ; and so it was, using "perpetuity" in its primary sense of "inalienable interest ;"<sup>4</sup> but the court (Porter, M. R.) considered and rejected the theory that this legacy could be sustained for the life of the present incumbent, thus apparently assuming that if the legacy had been confined to his life it would have been good. Speaking of the case

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<sup>1</sup> 21 L. R. Ir. 17, 18.

<sup>3</sup> 25 L. R. Ir. 388.

<sup>2</sup> 25 L. R. Ir. 325.

<sup>4</sup> See p. 519, *ante*.



of *Dillon v. Reilly*,<sup>1</sup> the Master of the Rolls says: "It cannot be treated as a decision that in a case where words are used which purport to tie up property beyond legal limits the court will from thence carve out a life estate, hold it good to that extent, and reject the rest."

There remain only two cases to notice. The first of these cases is *Hornberger v. Hornberger*.<sup>2</sup> A testator gave all his estate, after the death of his wife, to a city for the benefit of its poor; "subject to the following exception, to wit: the flower garden and graveyard where my child Jettie is buried, and where I expect myself and wife to be buried . . . is not to be sold under any circumstances, but the same is vested in my wife for and during her natural life, and at her death" the city "are to act as trustees, and are to hold said graveyard and flower garden in trust, and out of my estate to keep the same up." The court held that there was a good devise for charity; they say that if the testator carved "out of the charity fund a fund for a perpetuity which must fail, we are not at liberty because of the dependent and illegal devise to avoid the whole will; but, rejecting the part that is repugnant to law and public policy, we must allow the part which is lawful to be the will of the testator; that which is primary and valid must stand; that which is not primary and valid must fail." All that is said about the wife's life estate is in this sentence at the end of the opinion: "The trust to the wife of keeping up the graveyard and flower garden during her life is lawful." The nature of the proceeding, beyond the fact that it was a bill in equity, does not appear. It was not a bill for instructions, for the executrix (presumably the wife) was not the complainant. According to the reasoning of the court with reference to the city, if the trust to keep up the grave were bad, the wife would take the estate free from the trust; and it does not appear, nor is it likely, that she neglected to keep up the garden and graveyard, and that this was a suit to compel her to do so. The sentence last above quoted must therefore have been only a *dictum*. It is to be observed that no question of the Rule against Perpetuities arose in the case; it was a question not of a future but of a present interest; and the *dictum* was that one may hold property for life on an indefinite non-charitable trust; and this, it is submitted, was incorrect.

*In re Dean*,<sup>3</sup> commented on above. Here there was a gift in trust for the support of certain animals. North, J., speaking of a gift for the repair of a monument, said: —

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<sup>1</sup> Ir. R. 10 Eq. 152.

<sup>2</sup> 12 Heisk. 635.

<sup>3</sup> 41 Ch. D. 552, 557.

"I know of nothing to prevent a gift of a sum of money to trustees upon trust to apply it for the repair of such a monument. In my opinion, such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same in keeping that monument in repair, say, for ten years, is, in my opinion, a perfectly good trust."

On this case it is to be remarked (1) that it was not carried to the Court of Appeal; (2) that the decision was based largely on the case of *Mitford v. Reynolds*,<sup>1</sup> by which the judge felt himself bound, and in which the question does not appear to have been discussed; (3) that the judge did not refer to *Morice v. Bishop of Durham*; (4) that a trust for the perpetual repair of a monument is not obnoxious to the Rule against Perpetuities, for that rule relates to the creation of future interests, and has nothing to do with present interests, and that, if a trust for the repair of a monument is illegal, it is because there is no *cestui que trust* with an alienable interest, not because the trust is to begin on a remote contingency; (5) that even if a trust which can last longer than twenty-one years after lives in being were bad, then this trust for horses and dogs would be bad, because it might last conceivably for more than twenty-one years after the extinction of all *human* lives. The idea that the validity of a limitation over (or of a trust) may depend upon whether the limitation must happen (or the trust determine) within the lifetime of an animal is a notion as novel as it is ridiculous. Can a gift over be made to take effect upon the death of any animal however longevous, — an elephant, a crow, a carp, a crocodile, or a toad?

To sum up. I submit that the doctrine of *Morice v. Bishop of Durham* is good law, and is of general application.

There are only two exceptions, — funeral expenses and charities: the first is matter of necessity, the second is an exception in form only and not in substance.

*John Chipman Gray.*

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<sup>1</sup> 16 Sim. 105.



## UNWRITTEN CONSTITUTIONS IN THE UNITED STATES.

**I**T is not very uncommon, in recent years, to see in judicial opinions and other expositions of the law statements indicating a somewhat general and probably extending belief that the people of the United States have an unwritten constitution, supplementing, as it were, or standing back of, the written constitutions of the state and federal governments, which may sometimes be resorted to as a guaranty against oppressive or unjust legislation.<sup>1</sup> It will be found, however, that although the doctrine of an unwritten constitution has been referred to, with apparent approval, in various connections, it can hardly be said to have been treated in any case as sufficient basis to sustain the court in declaring a statute unconstitutional. If these expressions signify anything, they indicate a tendency rather than an established principle in judicial thought; and the purpose of this paper is not to collect the scattered references which may be found to the subject for the purpose of determining in how many courts some such principle may have been approvingly spoken of, but to ascertain, if possible, how such a principle would fit into our constitutional law. That it would be a modification of the general statement of the law as to the power of a court to declare statutes invalid because unconstitutional, is plain, in view of the repeated assertions of the courts in various states that they will not trench upon the discretionary

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<sup>1</sup> This assumed unwritten constitution has not, perhaps, been better described than by Mr. Justice Beck, of the Supreme Court of Iowa, in the opinion delivered by him in *Hanson v. Vernon*, 27 Iowa 28, 73. He refers to it in this language: "There is, as it were, back of the written constitution an unwritten constitution, if I may use the expression, which guarantees and well protects all the absolute rights of the people. The government can exercise no power to impair or deny them. Many of them may not be enumerated in the constitution, nor preserved by express provisions thereof, notwithstanding they exist and are possessed by the people, free from governmental interference. The rights of property and rights arising under the domestic relations of husband and wife, parent and child, etc., may not be preserved by express constitutional provisions, yet they exist in all their perfection, and no legislative enactment impairing them can be sustained." This statement, although not concurred in by the other members of the court when it was announced, is incorporated into the opinion of the same court in *State ex rel., Howe v. Mayor, etc., of Des Moines*, 103 Iowa 76. But the conclusion in support of which it was invoked in *Hanson v. Vernon* had been in the mean time overthrown by the case of *Stewart v. Supervisors of Polk County*, 30 Iowa 1.

powers of the legislatures to make the law, except so far as that power is exercised in contravention of some express or implied limitation found in the constitution of the state, or in the federal constitution.<sup>1</sup> A full consideration of this assumed doctrine of an unwritten constitution may lead to the conclusion that any confusion which exists on the subject is due rather to an inapt or indefinite use of terms than to any radical difference of opinion as to the principles to be recognized in the interpretation of written constitutions.

Historically it is of course true that there are principles of constitutional law which have not been embodied in our written constitutions, and it must be conceded that it is impossible in a written constitution to state fully the law of the subject so as to render reference to the general constitutional principles recognized by English speaking people unnecessary, just as it is impossible in a code or compilation of statutes to state fully the rules of the unwritten law so as to avoid the necessity of further reference to them. From the point of view of the student of constitutional law it is evident that we have in a general sense an unwritten constitution; I mean, in that sense in which we generally say that there is an unwritten constitution of Great Britain. But it is quite important to bear in mind the significance of this so-called unwritten constitution, and to carefully consider whether a statute which is unconstitutional in the sense that it violates some principle of such a constitution is necessarily unconstitutional in the sense in which a statute which violates some rule of a written constitution is said to be unconstitutional. Professor Dicey, in his discussion of the law of the English constitution, makes a distinction,

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<sup>1</sup> This view is succinctly stated by Mr. Justice Mercur in *Butler's Appeal*, 73 Pa. St. 448, as follows: "We cannot review the wisdom or expediency of legislative enactments. They must violate some prohibition, expressly declared or clearly implied, of the constitution of this state, or of the United States, before we can pronounce them to be unconstitutional." Some form of statement, substantially the same as this, is repeatedly used, but quotations from or citations of authorities on the point are not necessary.

In the recent case of *Youngerman v. Murphy*, 107 Iowa 686, Mr. Justice Deemer uses the following language, which may be cited as pertinent in view of the references in the preceding note to language used by judges of the Iowa court in earlier cases: "Courts have the undoubted right to inquire into the objects of a tax, and to declare invalid all taxes that are levied for other than governmental purposes, and it is no doubt true that a tax may be held invalid on account of some implied prohibition of the constitution. . . . And yet the court will not interfere unless it is clear that the legislature has exceeded its power. . . . Courts interfere only when some prohibition of the fundamental law is violated, or when the act is clearly in violation of some implied prohibition of the constitution."

which I believe is original with him, between that portion of the English constitution which is law, and that part which is merely convention. Contrary to what has generally been assumed to be true of an unwritten constitution, he shows that there are parts of the constitution of Great Britain which the courts themselves will recognize, and which have all the force of law, while there are other parts fully recognized as such which cannot receive any recognition in the courts. For instance, as he points out, on the one hand, the rule that a statute must receive the assent of the sovereign is a part of the law of Great Britain, and without such assent a statute would not be accorded any validity in the courts; while, on the other hand, the rule that the sovereign can act only through the prime minister is no part of the law, but is a mere usage, which may at any time be overthrown, and to which the courts will accord no recognition. Now, the conception of a constitution which prevails in the United States limits that term to the written embodiment of rules which are part of the law, and does not give the same force to usages which are nothing more than conventions. Attention to this diversity in the use of terms will perhaps free us to some extent from the misconceptions of those who ask for a recognition with us of an unwritten constitution. When writers, who insist on the use of the term with reference to our system of government, attempt to put their fingers upon something which is a part of the constitution, but unwritten, they cite us to rules in accordance with which presidential electors feel bound to vote for the candidate for president of the party on whose ticket they are elected, or an assumed rule in accordance with which the president of the United States may be reelected once, but not oftener.<sup>1</sup> Such writers ought to go further in their list of illustrations, and include the rule, so often popularly assumed to exist, that no senator can ever become president of the United States, and no vice-president can ever be promoted to the office of president by election; and then, having recognized as an exception the fact that this latter rule did not apply in the earlier period of our history, when vice-presidents were elected by reason of receiving the second highest vote for the presidency, they should also be ready in due time, if necessary, to incorporate another exception to the effect that the rule is not applicable to vice-presidents who attain to the presidency on the death of the chief executive especially in the case of one who is able to shoot Rocky Mountain

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<sup>1</sup> See Dicey, *Law of the Constitution*; Tiedeman, *Unwritten Constitution*.

lions on the wing in Colorado. These rules are evidently mere statements of what has been, and may properly be expected to continue to be, the invariable custom, until there is some change in condition rendering a departure from such custom desirable and practicable. Such customs are no part of the law, and they should not be spoken of with us as parts of the constitution in any sense of the term. It is not open to us, should we see fit to do so, to call mere usages or conventions a part of our constitutional law. The conception of a constitution of that form which we call written is so radically different from that involved when an unwritten constitution is spoken of that the two conceptions must be kept entirely distinct.

A written constitution is not merely a codification of an unwritten constitution. If the analogy between written and unwritten law could be followed out in comparing the two kinds of constitutions, the existence of an unwritten constitution would necessarily be granted. But the entire lack of analogy between the two cases becomes apparent when we look critically for the sources from which our written constitutions are derived. On close inspection we shall see that they are not simply codifications of the unwritten constitution of Great Britain, but are in origin and effect radically different. To a certain extent codification of the unwritten constitution has taken place in Great Britain, but the embodiment in a statute of the rules and principles of the British constitution gives to them higher efficacy than that which they previously possessed, while with us no statutory embodiment will help out constitutional rules, for they are either higher than statute, or they are no part of the constitution.

Attention to the line of historical development of constitutional law in the United States will make clear the distinction. In the first place, the colonists had contended that they were entitled to all the fundamental rights of English subjects, and some of the principles of the English constitution were so prominently in the public mind during the colonial period and the struggle for independence that they were in written form placed in the fundamental charters of state and federal governments. For instance, the idea of due process of law, from Magna Charta, and the sovereignty of law as against mere arbitrary power, recognized in the Habeas Corpus Act, and the equality of all citizens before the law, recognized throughout all English history in the struggle for popular rights, were too valuable an heritage to be overlooked. To this extent our constitutions may be recognized as codifications of the

unwritten constitution of England, and, indeed, some of the written portions of the English constitution, so-called, such as the Declaration of Rights, furnish provisions which have been directly incorporated into state constitutions, just as portions of the Declaration of Independence were put into the first constitution of Pennsylvania. But it was never attempted to put into any state constitution all the general principles which had been contended for as a part of the British constitution. For instance, taxation without representation, and government without the consent of the governed, have been generally condemned as violations of the principles of the English constitution, but in no state constitution, probably, have these violations of fundamental right been directly prohibited. They might, no doubt, be said to be subversive of the principles of our system of government, but it is hardly conceivable that they could be directly forbidden in a written constitution.

In the next place, the theory of division of powers of government among departments, no one of them supreme, was borrowed, no doubt, directly from the English constitution, but its practical application is to be traced rather to the accidental form of colonial governments than to a theoretical arrangement of the powers of government according to an abstract rule. We have probably not given sufficient prominence to a consideration of the nature of the colonial governments as the prototypes of the state governments founded upon them. In each of the colonies there was a legislative body, an executive, and a system of courts, not because that was theoretically the right plan of government, but because the peculiar circumstances of the colonists had led to this practical arrangement. The developments of the state governments out of the governments existing under the colonial charters accounts for what is perhaps the most striking and significant theory of our constitutional system, to wit, the doctrine that as each department possesses only a delegated authority, therefore its acts in excess of the authority delegated to it are void. It is not quite accurate to announce this principle in such a way as to make the courts superior to the other branches of the government. What the judiciary does in excess of the power given to it is equally void with legislative and executive acts in excess of authority, and the courts themselves so hold. The fundamental proposition which is most important is that nowhere is there unlimited authority, and this fundamental principle works a complete revolution in the notions of sovereignty which have been developed by writers on English law. Not only with us is there divided sovereignty, but,

in a legal sense, no sovereignty whatever. For some purposes each state in the Union is in some things sovereign, while in other matters is it subordinate to the power of the federal government; the federal government, on the other hand, though sovereign as to some matters, is confessedly as to other proper functions of government entirely without authority. To point out, for the purposes of municipal law, any person or persons possessing sovereignty is impossible. We may, if we please, by way of fiction and mere convenience, say that the people are sovereign, and this conception was strong in the minds of the framers of the first state constitutions. For them to substitute the people for the sovereign, in passing from a charter government to a state government, was natural, and for many purposes this mere substitution of a fictitious for a real sovereign was practically effective, as is illustrated by the existence of the state governments in Connecticut and Rhode Island for some years, with no other guide to the authority of the different branches of government than that furnished by their colonial charters. But is it not apparent that this conception of sovereignty in the body of the people is a mere fiction or assumption, in accordance with which the powers of government are exercised by those to whom they are delegated? What is it that the people can do? They can set up revolutions and overthrow the government, but that power they had under the unwritten constitution of Great Britain. The body of electors is not sovereign, for their power rests upon and is strictly limited by the constitutions themselves, while the very conception of sovereignty involves unlimited power. And the people, of whom the electors constitute at most only a one-fifth part, have really of themselves no governmental functions whatever.

The notion of strictly limited powers of government, which is the basis for the exercise by the courts of the authority to declare legislative or executive, or, for that matter, judicial acts, done in excess of authority, to be void, is to be traced to the conception that by the charter granted by the sovereign no powers were conferred other than those given by its terms. This conception is one wholly foreign to the unwritten constitution of Great Britain, and one which would probably never have pertained here, had it not been for the charter system.<sup>1</sup> The governing body of a charter

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<sup>1</sup> See article by Professor Morey in the *Annals of the American Academy of Political and Social Science*, entitled "Genesis of an Unwritten Constitution," vol. 1, p. 529; and an article by Brooks Adams in the *Atlantic Monthly* for November, 1884 (vol. 54, p. 610), entitled "The Embryo of a Commonwealth."



colony was neither more nor less than a corporation, and the right to pass on the validity of corporate acts was well recognized in the English courts. There had been some contention, it seems, in early English constitutional history for the proposition that an act of Parliament might be declared void by the courts, but such contention was not successfully established; and when the courts of the colonies and the states first attempted to exercise this authority it was strongly resisted, and it was eventually established only on the theory of the absolute limitation of the powers of the departments of colonial and state governments.<sup>1</sup>

The constitution then, as we understand the term when we speak of our written constitutions, is a part of the positive law, organic in its nature, and binding on all who live under it. It recognizes no sovereignty. It announces or embodies limitations upon the powers of all who exercise any public or governmental function. On the other hand, it is not a mere general collection of principles of right and justice, applicable to governments, embodying the *Rechtsgefühl* of the people, or, to paraphrase the term, the general feeling of right which the people have in reference to law and government.<sup>2</sup> It is a concrete thing, not depending upon mere theorizing from abstract principles, nor upon the notion which each particular executive, legislator, or judge may have as to what it ought to be. It has its disadvantages as compared with an unwritten constitution in that it is more restricted in its scope,

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<sup>1</sup> See Professor Thayer's article in 7 HARV. L. REV. 129 (November, 1893), and notes in his *Cases on Constitutional Law*, p. 28.

<sup>2</sup> Mr. Justice Scott, in *Walker v. Cincinnati*, 21 Ohio St. 14, uses this pertinent language (p. 41): "Courts cannot, in our judgment, nullify an act of legislation, on the vague ground that they think it opposed to a general 'latent spirit,' supposed to pervade or underlie the constitution, but which neither its terms nor its implications clearly disclose in any of its parts. To do so would be to arrogate the power of making the constitution what the court may think it ought to be, instead of simply declaring what it is. The exercise of such a power would make the court sovereign over both constitution and people, and convert the government into a judicial despotism. Whilst we declare that legislative power can only be exercised within the limits prescribed by the constitution, we are equally bound to keep within the sphere allotted to us by the same instrument." And he continues (p. 47): "We do not mean to say that every legislative enactment is necessarily valid unless it conflict with some express provision of the constitution. Undoubtedly, the general assembly cannot divest A of his title to property and give it to B. They cannot exercise judicial functions. They can impose taxes only for a public purpose, for it is of the essence of a tax that it be for a public use. Nor can they by way of taxation impose a burden upon a portion of the state only, for a purpose in which that portion of the state has no possible peculiar local interest. But to justify the interference of a court upon any of these grounds, the case must be brought clearly, and beyond doubt, within the category claimed; and such we are persuaded is not the case in respect to the act in question."

but it has the corresponding advantage that it is definite and specific as to its protections. It is the result of historical progress and development, and is capable, like any other positive enactment, of being interpreted and applied with reference to conditions and circumstances not in the minds of its framers at the time it was enacted.

If this is the present meaning of the term constitution in the United States, it must be evident that there cannot be an unwritten constitution for any state, or for the United States. There may be constitutional principles or conventions which are of significance to the student of constitutional law, but these do not conform to any accepted test as to what is a constitution. The important principle that an act of any department in excess of its delegated power is void, and may be so declared when brought to the test of legality in the courts, is a principle based on the existence of definitely written constitutional statements, and one which never could have been recognized, and ought not to be recognized, with regard to the general theoretical limitations on governmental action found in the indefinite doctrines of an unwritten constitution.

The difficulty which is sought to be met by recognition of the theory of an unwritten constitution arises from an inaccurate conception of its nature. In the creation of departments of government, unlimited power is not given to any one. In our expositions of constitutional law it is often said that the federal constitution contains grants of limited powers only, while in a state constitution unlimited powers are granted, save as express limitations are imposed. But this is far from being an accurate statement. The state constitutions do, it is true, give general powers to the different departments of government, but they delegate to each department only the powers implied in the creation of such a department. Irrespective of any specific limitations, a court or an executive cannot levy taxes, while, on the other hand, the legislative department can levy taxes, not because such a power is expressly conferred on the one hand, nor because the powers of the legislative department are unrestricted on the other, but simply because the power of taxation is incident to legislative power. For a similar reason the legislative department cannot adjudicate cases, for such power is not incident to the existence of a legislature, but has, in the very nature of things, been delegated to the judiciary. The supposed necessity of recognizing an unwritten constitution arises out of a failure to realize that the legislative department is



by virtue of its creation limited to the exercise of legislative power. And it will no doubt be found that all the cases in which the restrictions of an unwritten constitution have been invoked as against unauthorized legislative action, might, with the same certainty and with much greater theoretical accuracy, have been determined on the theory that the legislature had attempted to go beyond the scope of legislative power. Such a limitation is to be sought in the constitution itself, and not by calling down, at the mere discretion and whim of the judge, some indefinite and intangible limitation out of the nimbus of an overhanging and enshrouding unwritten constitution.

As a concluding concrete illustration reference may here properly be made to cases which discuss the right of local self-government, and reach the conclusion that without regard to any express limitations in the constitution, state legislatures cannot deny or impair this right. In some of these cases, it is true, the judges speak of the right as protected by the limitations of an unwritten constitution, but the principal cases on the subject are not expressly put on this ground. For instance, in the leading case of *People ex rel. Le Roy v. Hurlbut*<sup>1</sup> Mr. Justice Cooley discusses the history of this feature of our constitutional system, and then says:<sup>2</sup> —

“In view of these historical facts, and of these general principles, the question recurs whether our state constitutions can be so construed as to confer upon the legislature power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned.”

And further, after pointing out what he considers would be the disastrous consequences of legislative interference, he continues:<sup>3</sup> —

“If this charter of state government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so, — if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which dis-

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<sup>1</sup> 24 Mich. 44.

<sup>2</sup> P. 105.

<sup>3</sup> P. 107.

tinguishes it from the numberless constitutions, so-called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours and have only been wanting in the support and vitality which these alone can give, — this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone."

He finally, however, takes a more definite ground on which to rest the conclusion which he would reach, and finds in the state constitution itself an express recognition of the right of local authority. It is evident, therefore, that in the first place he refers to what is sometimes spoken of as an unwritten constitution, although he does not use that term, in the most general way as embodying the spirit of our constitutions, and then specifically finds the principle contended for recognized in the constitution in question by necessary implication. It is also to be noticed that even as to the conclusion reached by Mr. Justice Cooley, the court in this case was equally divided, and that he alone relies on the general principles which he announces as supporting the conclusion contended for. It would not be practicable, within the scope prescribed for this article, to discuss the general question as to the extent to which a state legislature may go in the regulation and control of municipal affairs. The cases are conflicting in their results, and not harmonious in the principles announced. It is enough to say that so far as legislatures are found to be restricted in their right to control and regulate such matters, the restriction can be more safely based upon implication found in the nature of the power which is conferred upon the legislative department than by giving potency to general principles, assumed to exist in an unwritten constitution, existing above and beyond the written constitution by which powers of government are granted and limited.

*Emlin McClain.*

IOWA CITY, IOWA, Jan. 3, 1902.

## SOME OBSERVATIONS ON THE DOCTRINE OF PROXIMATE CAUSE.

CONSISTENT advance in the development of legal doctrines and in their application is impossible without a clear understanding of elementary definitions and concepts. While this has been insisted upon frequently in the past, to-day as never before there is a movement in all departments of knowledge, — in law, in metaphysics, in mathematics, — to reëxamine the concepts, axioms, and definitions upon which the superstructure of knowledge rests, and to secure greater clearness and accuracy of statement.

The great burden of legal decisions, in particular, is creating a demand for a more definite statement of principles which shall emancipate to some extent from the tyranny of things. In the general revision of elementary definitions it has been found that the value of comparing kindred ideas in different departments of learning is not confined to the study of languages or myths, and that such a method has a wide range of application. This must be my excuse for the non-legal portion of the present article. The term "proximate cause" has often been used by the bench as well as the bar in a vague and confused way, and such statements of it embedded in the decisions of able courts tend to add still further to the obscurity of the doctrine in the mind of the lawyer who has not given it special study. For this reason an historical and comparative study of the doctrine may be perhaps of some value.

The concept of Proximate Cause was first distinctly stated as a legal doctrine by Bacon, and was embodied in the first of his maxims in the phrase *In Jure non remota Causa, sed proxima spectatur*. The modern legal doctrine seems to be narrower and more definite in its application than some of the older expressions of the concept which can be found in more primitive systems of law or in the writings of philosophers prior to Bacon.

The concept has been applied, especially by the American courts, in four kinds of cases: (1) actions on policies of marine insurance; (2) highway cases; (3) actions of tort especially for negligence; (4) measure of damages.

(1) Let us consider first actions on policies of marine insurance.<sup>1</sup>

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<sup>1</sup> Cp. 2 Arnould on Marine Ins., 6th ed., 727; *Ionides v. Universal Marine Ins. Assn.*, 14 C. B. N. S. 259.

An insurance policy is of course a contract, but a contract of a peculiar kind, because from public policy the law tends to be favorable to commerce and to do what it can to protect and foster it. Cases of this kind will therefore furnish an interesting example of how a concept is altered in application by other circumstances.

In the case of *Nelson v. Suffolk Insurance Company*,<sup>1</sup> a vessel insured by the defendant company negligently collided with another vessel, and the owner of the insured vessel had to pay damages. He then sought to recover these damages which he had paid from the insurance company on the ground it was a peril of the sea insured against. The court held he was entitled to recover. Fletcher, J., said:<sup>2</sup> "We are thus led at once to inquire what losses come within the provisions of the policy as losses by perils of the sea. In ascertaining the cause of a loss in question, in a case of insurance, courts are governed by the well-known maxim of the law, *in jure non remota causa sed proxima spectatur*. This is now the well-established rule and is taken to be in accordance with the intention of the parties to the contract." In other words "whenever the thing insured becomes by law directly chargeable with any expense, contribution, or loss, in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution, or loss."<sup>3</sup>

The defence in the principal case relied upon the argument that the negligence of the plaintiff was the proximate cause of the having to pay damages and not the collision itself, although the collision would not have happened except for the negligence,<sup>4</sup> but the court held otherwise. Now what we have to notice is that the parties are conclusively presumed to intend that the maxim shall apply to their contract. Courts may differ as to whether or not a particular action A is proximate to a certain result R, and in deciding this question they may be influenced more or less by public policy; but if A is the proximate cause of R, then the contract is interpreted accordingly.

I shall have occasion to point out later that "proximate" in the phrase "proximate cause" does not necessarily mean next in place or time.<sup>5</sup> The term "proximate" in general has one of the follow-

<sup>1</sup> 8 Cush. 477 (1851).

<sup>2</sup> P. 490.

<sup>3</sup> *Peters v. Warren Ins. Co.*, 14 Pet. 112, per Story, J.

<sup>4</sup> This is much like the famous reply of St. Thomas Aquinas to the argument that God creates man and man commits sin, therefore God commits sin. If we assimilate the reply to the language of the court in the above case, "the negligence of God in creating a being with a sinful nature is not the proximate cause of the sin."

<sup>5</sup> 1 Shearman & Redfield, *Negligence*, 5th ed., sec. 26, citing 48 Minn. 134; Howe, *Studies in the Civil Law*, 202.

ing meanings: (1) no meaning at all, (2) principal, (3) nearest, (4) obvious. In many cases, however, and particularly in cases of insurance contracts, the nearest cause in time and place is considered the proximate cause.

"The maxim *causa proxima non remota spectatur* is of importance to be observed in these contracts. For it will be difficult, if not impossible, in the case of successive misfortunes happening to a ship from divers causes, to make a just apportionment of the injury to the peril; and as a general rule, which, when understood, will produce equality in its application, to attribute the loss to the last peril that affects the vessel, she having survived antecedent ones, is as safe and convenient as any which can be suggested."<sup>1</sup>

And in an English case, Mr. Justice Willes said:—

"In ascertaining the relative rights of the parties, you are not to trouble yourself with distant causes, or to go into a metaphysical distinction between causes efficient and material and causes final; but you are to look exclusively for the proximate and immediate cause of the loss."<sup>2</sup>

It may indeed happen that two causes appear to be contemporaneous and efficient. In such a case the rule has been stated by the Supreme Court of the United States<sup>3</sup> as follows:—

"When there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate when the damage done by each cannot be distinguished."

In regard to another kind of contract, viz. Bills of Lading, it has been observed by Broom:<sup>4</sup>—

"It should be noticed that exceptions in bills of lading are not construed strictly according to the maxim, . . . but the efficient, or, as it is sometimes called, the *causa causans*, is regarded to determine the liability of the ship-owner on his contract of affreightment."

Thus where the bill of lading contained an exception of accidents or damage of the seas, rivers, and steam navigation of whatsoever nature or kind soever, a ship-owner was held liable for loss of goods

<sup>1</sup> Parker, C. J., in *Rice v. Homer*, 12 Mass. 230, 234 (1815). Cp. Shearman & Redfield on Negligence, 5th ed. (1898) §§ 57–60. Cited *infra*.

<sup>2</sup> *Ionides v. Universal Marine Ins. Co.*, 14 C. B. N. S. 259, 289 (1863).

<sup>3</sup> *Howard Fire Ins. Co. v. Norwich, etc., Transportation Co.*, 12 Wall. 194 per Strong, J., citing with approval Phillips on Insurance, 1136, 1137.

<sup>4</sup> Legal Maxims, 6th ed. (1884), 216. This work treats generally of proximate cause and Lord Bacon's Maxim on pp. 211–224.

by collision caused by the gross negligence of the master or crew.<sup>1</sup>

(2) Let us now pass from the region of contract at common law to that of statutory liability. Cities and towns are made liable in this state for injuries caused by defects in highways which are due to their wrong or neglect. The liability here arises not from agreement, but is imposed by the state, and is therefore peculiar to the statute in question;<sup>2</sup> nevertheless the defect must be the proximate cause of the loss in precisely the same sense as in a case of marine insurance.<sup>3</sup> Here, to be sure, as the obligation is created by statute the maxim is applied rather to favor the city, whereas in the insurance case it is applied without favor to the insurance company. In other words, the proximate cause in a highway case must be a wrong of the city, and the city is liable, as Judge Holmes expresses it, not *qua* cause but *qua* wrongdoer.<sup>4</sup>

<sup>1</sup> Lloyd v. Screw Collier Co., 3 H. & C. 284; Grill v. Grill, L. R. 1 C. P. 600; Bank of India v. Netherland Steam Navig. Co., 10 Q. B. D. 521.

<sup>2</sup> Rev. Laws, c. 51, sec. 18, for example, provides that "If a person sustains bodily injury or damage in his property by reason of a defect or a want of repair or a want of a sufficient railing in or upon a way, causeway, or bridge, and such injury or damage might have been prevented, or such defect or want of repair or want of railing might have been remedied by reasonable care and diligence on the part of the county, city, town, or person by law obliged to repair the same, he may, if such county, city, town, or person had or, by the exercise of proper care and diligence, might have had reasonable notice of the defect or want of repair or want of a sufficient railing, recover damages therefor from such county, city, town, or person."

<sup>3</sup> Buswell on Personal Injuries, 2d ed., section 109, says one effect of the statute is that the rule that the contributory negligence of a third party will not excuse a defendant whose negligence is of itself an efficient cause of the accident is held not to apply. See generally 11 Allen 500; 7 Gray 104; 11 Gray 142; 13 Gray 344; 32 Me. 46; 20 Me. 47.

<sup>4</sup> Hayes v. Hyde Park, 153 Mass. 514. Cp. Marble v. Worcester, 4 Gray 395 (1855), where a horse became frightened by reason of the striking of a vehicle he was drawing against a defect in the highway. He freed himself from the control of the driver and at the distance of 50 rods knocked down a traveller upon the street who was using due care. It was held, but with a dissenting opinion, that the city of Worcester was not liable, although no other cause intervened.

A review of the decisions of the various states is given by Earl, J., in Ring v. Cohoes, 77 N. Y. 83, and the rule which governs in the absence of statutory provisions is stated thus: "When two causes combine to produce an injury to a traveller on a highway, both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have happened but for such defect." From this it appears that the Massachusetts doctrine of a more restricted liability is peculiar, and depends entirely on the provisions of the highway statutes. Cp. notes to Morse v. Town of Richmond, 98 Am. Dec. 608-612, and to Gilson v. Delaware, etc., Canal Co., 36 Am. St. Rep. 807. So Buswell on Personal Injuries section 109.



Chief Justice Shaw makes the following remarks on the difference between the metaphysical and legal uses of the maxim:<sup>1</sup>—

“The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said of mystery. It was a maxim, we believe, of the schoolmen, ‘*Causa causantis, causa est causati*,’ and this makes the chain of causation, by successive links, endless. And this perhaps in a certain sense is true. Perhaps no event can occur which may be considered as insulated and independent, every event is itself the effect of some cause or combination of causes, and in its turn becomes the cause of many ensuing consequences, more or less immediate or remote. The law, however, looks to a practical rule, adapted to the rights and duties of all persons in society, in the common and ordinary concerns of actual and real life, and on account of the difficulty in unravelling a combination of causes and of tracing each result, as a matter of fact to its true, real, and efficient cause, the law has adopted the rule before stated, of regarding the proximate, and not the remote, cause of the occurrence which is the subject of inquiry.”

In these highway cases, then, the wrongful act must be the proximate cause of the injury, and the act must be the act of the city. A third party may intervene between the defect and the injury and may in some sense contribute to the latter, but if his act be innocent the city's act is still the proximate cause.<sup>2</sup> For example, in one case a telephone wire had sagged to a point close to the road and a wagon passing along caught its wheels in the wire, thus carrying it along and hitting a man driving in the opposite direction.<sup>3</sup> Mr. Justice Holmes said in the opinion:—

“To an extent not yet perhaps exactly determined wrongdoers are presumed not to contemplate wrongdoing by others,—therefore, generally, they are not liable if another wrongdoer intervenes between their act and the result. But the mere fact that another human being intervenes is not enough. His intervention is important not *qua* cause but *qua* wrongdoer.”

(3) Let us now pass into the region of torts, and see what has been said of the maxim in this field. I quote from the last edition of a leading work on Negligence:<sup>4</sup>—

“The breach of duty upon which an action is brought must be not only

<sup>1</sup> *Marble v. Worcester*, 4 Gray 395, 397 (1855).

<sup>2</sup> In *Alexander v. Newcastle*, 115 Ind. 51, the municipality had left an excavation negligently in a street, but was held not liable to one who was violently thrown into the hole by another person.

<sup>3</sup> *Hayes v. Hyde Park*, 153 Mass. 514.

<sup>4</sup> 1 *Shearman & Redfield*, 5th ed. (1898), sec. 26.

the cause, but the proximate cause of the damage to the plaintiff. . . .<sup>1</sup> We adhere to this old form of words, because, while it may not have originally meant what is now intended, it is not immovably identified with any other meaning, and is the form which has been so long in use that its rejection would make unintelligible nearly all reported cases on the question involved.<sup>2</sup>

"The proximate cause of an event must be understood to be that which in a natural and continuous sequence unbroken by any new, independent cause produces that event and without which that event would not have occurred.<sup>3</sup> Proximity in point of time or space, however, is no part of the definition.<sup>4</sup> That is of no importance except as it may afford evidence for or against proximity of causation, that is, the proximate cause which is nearest in the order of responsible causation.

"The *proxima causa* was originally the same as the *causa causans* or cause necessarily producing the result. But the practical construction of 'proximate cause' by the courts has come to be the cause which naturally led to and which might have been expected to be directly instrumental in producing the result. . . . The necessity for connecting an injury with a responsible agent before compensation can be awarded has led to the identification of the rule embodied in the maxim with another legal principle which bears more directly upon the question of accountability, viz. that 'every man must be taken to contemplate the probable consequences of the act he does.'<sup>5</sup> On the other hand, as we shall point out elsewhere, 'wrongdoers are presumed not to contemplate wrongdoing by others unless they are shown in fact and actually to have contemplated it. Therefore, generally they are not liable if another wrongdoer intervenes between their act and the result.'"<sup>6</sup>

Let us now examine a few cases to see how this definition is applied practically.

In *McDonald v. Snelling*,<sup>7</sup> one whose servant drove in the public street so negligently as to collide with another carriage, thereby

<sup>1</sup> Citing *Kistner v. Indianapolis*, 100 Ind. 210; *Scheffer v. Railroad Co.*, 105 U. S. 249.

<sup>2</sup> Citing *Ehrgott v. N. Y.*, 96 N. Y. 264, 281; *Norwood v. Raleigh*, 111 N. C. 236; *Florida R. Co. v. Williams*, 37 Fla. 406; *Davis v. R. R. Co.*, 67 N. W. (Wis.) 167.

<sup>3</sup> *Taylor v. Baldwin*, 78 Cal. 517; *Hoag v. Lake Shore, etc., Ry. Co.*, 85 Pa. St. 293; *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 469; *Putnam v. Broadway, etc., R. R. Co.*, 55 N. Y. 108; *Sharp v. Powell*, L. R. 7 C. P. 253; *Pa. R. R. Co. v. Ken.* 62 Pa. St. 353; *West Mahoney Transp. Co. v. Wagner*, 116 Pa. St. 344; *Ins. Co. v. Brown*, 95 U. S. 117; *Topsham v. Lisbon*, 65 Me. 449; *State v. Manchester R. R. Co.*, 52 N. H. 552. See also *Cooley on Torts* 69; *Addison on Torts*, sec. 6.

<sup>4</sup> 48 Minn. 134.

<sup>5</sup> 36 Am. State Rep. 807, 809.

<sup>6</sup> *Holmes, J., in Hayes v. Hyde Park*, 153 Mass. 514.

<sup>7</sup> 14 Allen 290. Compare *Marble v. Worcester*, p. 544, note 4, *supra*, where the facts were nearly identical.



causing the horse attached to the latter to take fright and run away, was held liable to a person injured by the runaway horse in its flight.

We see at once here that "proximate cause" has no longer the same meaning as in marine insurance contracts. It now means that of which the results are the "natural and probable effect," in the sense that a reasonable man might properly foresee them.<sup>1</sup> Thus in this case the court held a man driving with a careless servant might be reasonably expected to foresee that some trouble of the sort which did happen, might happen. This difference is noted in the opinion of Foster, J., in the case last cited.<sup>2</sup> He says:—

"Perhaps the truth may be that a maxim couched in terms so general as to be necessarily somewhat indefinite has been indiscriminately applied to different classes of cases in different senses, or at least without exactness and precision, and that this is the real explanation of the circumstance that *causa proxima* in suits for damages at common law extends to the natural and probable consequences of a breach of contract or tort; while in insurance cases and actions on our highway statute it is limited to the immediately operating cause of the loss or damage. If this be so, the frequent reference to the maxim in cases like the present is not particularly useful, and certainly not conducive either to an accurate statement of principles or to uniform and intelligible results."<sup>3</sup>

It is claimed that a different rule prevails as to malicious torts from that which applies in the case of ordinary torts.<sup>4</sup> A recent writer says: <sup>5</sup>—

<sup>1</sup> "One who violates duty owed to others or commits a tortious or wrongfully negligent act is liable, not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to and in fact do, result from his act." Devens, J., in *Smithhurst v. Independent Cong. Church*, 148 Mass. 261, citing *McDonald v. Snelling*, 94 Allen 290; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Metallic Casting Co. v. Fitchburg R. R.*, 109 Mass. 277; *Derry v. Flintner*, 108 Mass. 131.

In the *Cong. Church* case snow from a roof fell on a horse causing a wagon to start which injured a passer-by.

<sup>2</sup> *McDonald v. Snelling*, 14 Allen 290, 294.

<sup>3</sup> Compare *Thomas v. Winchester*, 2 Selden 397, where a druggist who carelessly labelled a deadly poison as a harmless medicine was held liable to one who was injured by using it as a medicine, although the article had passed through several intervening hands. Here the injury was a natural and probable result of the druggist's mistake. On the other hand, in *Sheffer v. Railroad Co.*, 105 U. S. 249, where by reason of a railroad collision a passenger became disordered in mind and body and some eight months afterwards committed suicide, it was held that his own act was the proximate cause of his death, and that the railway company was not liable.

A contrary view is taken by the author of the note to *Gilson v. Delaware Canal Co.*, 36 Am. St. Rep. 809, who says at p. 821 that there is no difference in the measure of liability between wilful and negligent torts, except perhaps where one wilfully assumes dominion over another's property.

<sup>5</sup> In 25 Law. Rep. Ann. 87.

"Proximate consequences are regarded in case of mere negligence as covering only such direct and immediate results as occur without the intervention of any outside or independent agency, while in the case of wilful and malicious acts, consequences which might have been reasonably expected or foreseen are deemed proximate though outside and independent agencies do intervene."

In other words, in these cases the original evil will is supposed to infect the whole circle of circumstances, and a more favorable rule is applied for the benefit of the injured person, probably with the idea, in part at least, of punishing the prime mover.

In a recent Vermont case one who shot at a dog, which being wounded ran into a house and attacked a person therein, was held to be the proximate cause of such damage; "whether the injury was, or could have been foreseen or not, or was or was not the probable consequence of the act; for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events."<sup>1</sup> The court further said that this rule was universal where the injurious act is wanton;<sup>2</sup> but that in Vermont it is sufficient if the act be voluntary.<sup>3</sup> The limit of this principle (except perhaps in Vermont) is shown in the suit brought by Laidlaw against Russell Sage. It will be remembered that Sage was attacked by one who was trying to extort money by threats, and just as an explosion occurred Sage drew Laidlaw, who was in his office, in front of him. The court held that the explosion and not the act of Sage was the proximate cause of Laidlaw's injuries, as it was not shown that the injuries had been increased by Sage's act.<sup>4</sup>

The principle in malicious torts applies<sup>5</sup> to (1) acts directly malicious, (2) acts like wilful misrepresentations and false warranties, (3) acts conclusively presumed to be malicious, such as violations of statutes. The citizen is presumed to know the statute law, therefore a violation of statute is always constructively wilful.

That the proximate cause may consist of more than one individual acting separately is shown by the case of a collision between two vehicles, where the jury were instructed that the carelessness of either driver to create liability must be the "natural, probable, and proximate cause of the accident," and that if the accident was

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<sup>1</sup> *Isham v. Dow*, 70 Vt. 588, per Rowell, J.

<sup>2</sup> 16 Am. & Eng. Cycl. Law 434.

<sup>3</sup> *Vincent v. Stinehour*, 7 Vt. 66; *Wright v. Clark*, 50 Vt. 130; *Taylor v. Hayes*, 63 Vt. 475; *Bradley v. Andrews*, 51 Vt. 530.

<sup>4</sup> *Laidlaw v. Sage*, 158 N. Y. 73.

<sup>5</sup> 25 Law. Rep. Ann. 87.

caused by the carelessness of both drivers, then both defendants were liable.<sup>1</sup> The principle upon which this proceeds is that the act of the defendant being a cause and a direct cause of the injury, the plaintiff should not be deprived of his remedy merely because a third person happens to contribute also to the injury.<sup>2</sup>

Of course if the third person is one for whom the plaintiff is in any wise responsible, as in a case where, for example, the situation being reversed, the doctrine of *respondeat superior* might apply, then the action of such third party becomes the action of the plaintiff and bars his recovery.<sup>3</sup>

If the third person is an agent of the defendant the question is whether he is acting within the scope of his employment or whether his act is simply wanton. The matter has been stated in this way on principle: "The act of a responsible agent is not a natural and probable consequence, and therefore breaks the causal connection whenever it tends to produce an injury of a character different from that which the original tortfeasor must, according to the usual theory of accountability, be deemed to have contemplated."<sup>4</sup>

(4) In a matter of damages the question is, not what cause was proximate to certain effects; but, the cause being determined, what effects are proximate to it, can justly be said to constitute the result. Just as in mathematics we do not carry our decimal fractions or logarithms beyond a necessary and convenient number of places, so in law we need a workable measure of damages, albeit exactness is never possible. The legal question is not one of pure cause and effect, but "partly one of cause and effect, partly one of proof, partly one of public policy, and partly one of the nature of the wrong complained of."<sup>5</sup> Damages are generally divided into direct, proximate, consequential, and remote.

Thus, in one case, an aeronaut descended into the plaintiff's garden; and being in peril he called for help. A crowd thereupon broke into the garden and damaged the plaintiff's fruits and vege-

<sup>1</sup> *Randolph v. O'Riordan*, 155 Mass. 331.

<sup>2</sup> *Buswell on Personal Injuries* (1893), sec. 103, citing *Lane v. Atlantic Works*, 111 Mass. 136; *Sheridan v. Brooklyn R. R.*, 36 N. Y. 39; *Barrett v. Third Ave. Ry.*, 45 N. Y. 628; *Webster v. Hudson R. R.*, 38 N. Y. 260; *Spooner v. Brooklyn R. R.*, 54 N. Y. 230; *Eaton v. Boston & Lowell R. R.*, 11 Allen 500; *Burrell Township v. Uncapher*, 117 Pa. St. 353; *Carterville v. Cook*, 129 Ill. 152. Also 122 Pa. St. 288; 122 Pa. St. 661; 74 Ia. 392; 71 Wis. 41; 119 Ill. 232.

<sup>3</sup> *Little v. Hackett*, 116 U. S. 366.

<sup>4</sup> 36 Am. St. Rep. 842.

<sup>5</sup> *Sedgwick, Elements of Damages*, 45.

tables. The aeronaut was held liable for what the crowd did as well as for damage by the balloon.<sup>1</sup> Here the latter damage was direct, the former proximate. Diversion from the plaintiff's business might have been consequential damage, and the loss of prizes he expected to get by his vegetables a remote damage.<sup>2</sup>

The law as to damages may be summed up as follows: Proximate losses are of two kinds, direct and consequential. Direct losses are always proximate and are such as proceed immediately from wrongful conduct without the intervention of any intermediate cause; while consequential losses are proximate when the natural and probable effect of the wrongful conduct is to set in operation the intervening cause from which the loss directly results.<sup>3</sup>

In modern law then we find the concept of proximate cause doing duty in two senses. (1) In contracts and highway cases it means a cause which is fairly the efficient and moving cause of a certain given result, (2) in torts, and in contracts as far as questions of damage are concerned, the defendant's act is a proximate cause of the natural and probable results. In actions of tort the question whether a result is the natural and probable result of a certain act is determined by common sense, *i. e.* by the jury. In contracts the question whether in a given case A or B is the proximate cause of a loss and the cause of losses C and D or whether cause X has intervened to produce D, such intervention itself not being a natural and probable result of A or B, is for the court under certain fixed rules which have grown up.

There are certain other departments of modern law in which the doctrine of proximate cause is still to be considered, but these involve a somewhat different aspect, and I wish to carry the historical survey of the doctrine a little further, after which I will return to them later.

I have already mentioned the fact that the maxim is the first one in Lord Bacon's list. The writer of a "brilliant article"<sup>4</sup> in the

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<sup>1</sup> *Guille v. Swan*, 19 Johns. 381.

<sup>2</sup> In the famous *Squib Case* (*Scott v. Shepherd*, 2 Wm. Bl. 892), the defendant threw a lighted squib into a market. It fell upon the stall of A, who to save himself threw it upon the stall of B, who also threw it away, and it struck the plaintiff and put out his eye. The defendant was held responsible, and the injury was held a ground of liability for the reason that the action of the intermediate agents was involuntary.

<sup>3</sup> *Hale on Damages*, secs. 22-26. Whether a result is natural and probable is for the jury. *Haverly v. State Line R. Co.*, 135 Pa. St. 50. In contracts the question is usually of consequential damages. *Hobbs v. Railroad Co.*, L. R. 10 Q. B. 111, 122; *Hammond v. Bussey*, 20 Q. B. D. 79, 89.

<sup>4</sup> 48 *Law Times* 371.

American Law Review<sup>1</sup> says that the maxim is not found in the civil law nor in English law before Bacon's time. In the preface to his *Regulae*, Bacon himself says:—

“Whereas some of these rules have a concurrence with the civil Roman law, and some others a diversity, and many times an opposition; such grounds as are common to our law and theirs I have not affected to disguise into other words than the civilians use to the end they might seem invented by me, and not borrowed or translated from them; no, but I took hold of it as a matter of great authority and majesty, to see and consider the concordance between the laws penned and as it were dictated by the same reason.”

This seems to show that Bacon himself thought our maxim did not exist in the Roman law. But against these opinions I will put a quotation from *Studies in the Civil Law*, by W. Wirt Howe of the New Orleans Bar.<sup>2</sup> Mr. Howe says:—

“It is believed that the maxim is not to be found in the Roman law in so many words, but the concept was there. It may have been devised by some canonist, or Bacon may have made it himself after the fashion of his day. When quoted it is often followed by his commentary, in which he says: ‘It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause and judges of acts by that without looking to any further degree.’”

About B. C. 286 or A. U. C. 467, a period when many laws were passed in the Roman republic for the benefit of the people,<sup>3</sup> the Aquilian law was passed, designed to give a remedy for wrongful injury to the slaves of another.<sup>4</sup> Celsus, who was a prominent commentator upon the Roman law, speaks of the following case in these words:—

“If one should precipitate a slave from the top of a bridge, Celsus decides that his act would give rise to an action under the Aquilian law, whether the slave should die from the blow he had received, or by being immediately submerged and drowned, or whether he should perish after being tired out in his struggles with the current.”<sup>5</sup>

Mr. Howe,<sup>6</sup> after citing this case, says:—

<sup>1</sup> 4 Am. L. Rev. 201 (1870), Joseph Willard, Esq.

<sup>2</sup> P. 201.

<sup>3</sup> *E. g.* the Hortensian laws. One of these tending to create unity was that the Resolutions of the Tribes should be law for the whole people.

<sup>4</sup> See Grueber *Lex Aquilia* (1886), 23, 199.

<sup>5</sup> Dig. 9, 2, 2, 7, 7. Cp. Paul as to liability for a fire negligently kindled on a windy day.

<sup>6</sup> *Op. cit.*, p. 201.

"The point of this statement would seem to be that in determining whether a wrongful act is the proximate cause of an injurious result, the question is not merely of time and space but of immediate and efficient causation in the juridical sense."

Celsus also says that there is a difference between the case of one who has killed a man and one who originated the cause from which death resulted. The latter was not liable under the Lex Aquilia, but subject only to an *actio in facto*, like one who had given a sword to a madman.

Let us consider for a few moments the use made of the phrase proximate cause in philosophy.

"It is a correct position," says Bacon, "that true knowledge is knowledge by causes."<sup>1</sup> "And causes again are not improperly distributed into four kinds: the material, the formal, the efficient, and the final. But of these the final cause rather corrupts than advances the sciences except such as have to do with human action. The discovery of the formal is despaired of. The efficient and the material (as they are investigated, that is as remote causes) are slight and superficial, and contribute little if anything to true and active science."

Now of course Bacon has adopted this classification of causes from Aristotle.<sup>2</sup> Aristotle says in his "Organon,"<sup>3</sup> "there is a difference between knowing that a thing is, and knowing *why* it is, and the science of the why has respect to τὸ πρῶτον αἰτίον or *causa proxima* as the schoolmen expressed it."

Joseph Willard, Esq., in the article above alluded to,<sup>4</sup> gives extracts which summarize the views of some of the leading schoolmen. These are so interesting that I take the liberty of quoting nearly all of them.

Marsilius Ficinus<sup>5</sup> says: "From the remote cause the effect does not *necessarily* follow."

Joannes Versor<sup>6</sup>: "*Nam posita causa remota non ponitur effectus, sed ipsa remota removetur.*"

<sup>1</sup> Nov. Org., Bk. II, Oph. 2. Wharton on Negligence, section 73, by comparing with other passages in Bacon shows that "proximate cause" was regarded by him as "efficient cause." Compare *Ins. Co. v. Boon*, 95 U. S. 117, in which it is said that "proximate cause is the efficient cause, the one which necessarily sets the others in motion."

<sup>2</sup> See *Meta.*, Bk. I, ch. III; *Book I*, ch. II; Bk. II, ch. IV.

<sup>3</sup> *Post. Analy.*, Bk. I, ch. 13.

<sup>4</sup> 4 Am. L. Rev. 204.

<sup>5</sup> *Theologica Platonica*, Bk. 9, ch. 4.

<sup>6</sup> *Quaestiones super novam logicam*, 1 Ar. Post.



Averroes<sup>1</sup>: "It is necessary for demonstration, showing why a thing is that it should be by a proximate cause."

Petrus Tartaretus<sup>2</sup> says: "The demonstration why a thing is, proceeds by a proximate cause."

Sebastianus Contus<sup>3</sup> says: "The knowledge why a thing is, is gained by a proximate cause."

Albertus Magnus says a comet is a remote cause of war, a quarrel the proximate cause.

Occam<sup>4</sup> says: "By the remote cause is not meant something which is cause of a cause or the cause of several causes."

I have alluded in a note to what Thomas Aquinas said about imputing sin to God. The opposite position is stated by Duns Scotus<sup>5</sup> in the phrase: "*quicquid est causa causae est causa causati.*" Aquinas, however, points out<sup>6</sup> the notion of intervening cause, which we have seen is so powerful in law at the present day. "It is to be said that the effect of a middle cause, proceeding from that cause so far as it follows the order of the first cause, is referred to the first cause. But if it proceeds from the middle cause, so far as this departs from the order of the first cause, it is not referred to the first cause. Thus if an agent does something contrary to the mandate of his master, this is not referred to the master as its cause, and similarly sin which free will commits against the precept of God is not referred to God as its cause."

Of course the other side of the case should not be overlooked. In a certain sense the whole causal nexus of the world must be present in order to have the particular accident or event possible.<sup>7</sup> This is expressed in the Buddhist doctrine of Dependent Origination. In the Vissuddhi-Magga<sup>8</sup> it appears that the cause of being in general or of any being in particular may consist of several elements, and if one of these elements be lacking the results will not follow. "For," it is said, "the ignorance, etc., which have been enumerated as constituting dependence when they originate any of the elements of being, namely Karma and the rest, can do so only when dependent on each other and in case none of their

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<sup>1</sup> Post, An., Lib. 1, ch. 2, Comment 30.

<sup>2</sup> Expositio super textu logices Aristoteles.

<sup>3</sup> In Universam Dialectam Aristoteles. 1 Anal. Post, cap. 10.

<sup>4</sup> Summa Totius Logicae, 2 pt. of 3 pt., ch. 20.

<sup>5</sup> Quaestiones Subtillissimae in Metaphysicam, Book 5, Question 1, Opera IV, pp 595 b, 596 b.

<sup>6</sup> Summa Theologica, 1st pt. of 2d pt., Question 79, art. 1.

<sup>7</sup> 1 Bosanquet, Logic, 259 ff.

<sup>8</sup> Chap. XVII.

number is lacking." On the one hand the proximate cause may be considered as something selected from a causal nexus of co-existing things to express the essence of something; this is use by way of logical explanation. Or, on the other hand, going backward in time, all causes are cut off at the further end which are called remote and then coming down in time everything between the cause and the effect is an instrument of the cause and taken up into it. We should, however, always bear in mind a warning of Lord Bacon: "also you may not confound the act with the execution of the act; nor the entire act with the last part, or the continuation of the act." For example: if there be a lease of land, and the lessee assigns part of his interest without the consent of the landlord, which he cannot lawfully do, and which causes the lease to be forfeited, and the lessor enters to dispossess the lessee, the immediate cause, according to Bacon, "is from the law in respect of the forfeiture, though the entry be the act of the party: but that is but the pursuance and putting in execution of the title which the law giveth."<sup>1</sup>

Now what determines where we shall stop in the process of picking out what we denominate the proximate cause? In other words we have considered the *causa proxima*, we have now to consider the *spectatur*. But in this we have reached a new aspect of the matter, — the question of purpose. There is no longer the mere succession of events in the mechanical world, there is the question of intent.<sup>2</sup> This brings us at once to the consideration of some of the matters in modern law, the examination of which has been deferred until now. Lord Bacon himself pointed out certain cases where in his opinion the maxim did not apply. He says:<sup>3</sup> —

"This rule faileth in covinous acts, which, though they be conveyed through many degrees and reaches, yet the law taketh heed of the corrupt beginning and counteth all as one entire act." *Dolus circuitu non purgatur*.<sup>4</sup>

"In like manner this rule holdeth not in criminal acts, except they have a full interruption; because when the intention is matter of substance

<sup>1</sup> 7 Bacon's Works, 329.

<sup>2</sup> "Jedes konkrete Rechtsgeschäft hat zwei Seiten durch deren Abstraktion und generische Betrachtung man zwei Einteilungen der Geschäfte erhält; die eine nach dem nächsten (ersten) *Effekt* der Geschäfte, die Andere nach ihrem *Zweck* (der ersten Absicht) dessen Verwirklichung der Zweite Effekt ist." 1 Holtzendorff, Rechtslexikon, 454-456 (*Causa*).

<sup>3</sup> 7 Bacon's Works, 328.

<sup>4</sup> Broom's Legal Maxims, 6th ed. (1884), 222. Compare as to malicious torts, pp 547, 548, *supra*.



and that which the law doth principally behold there the first motive will be principally regarded and not the last impulsion." <sup>1</sup>

Thus suppose A fires a pistol at B and misses him, and then runs away, B follows with a knife and stabs at A, but A hits him with a club and kills him. Here it might appear that the killing was done in self-defence, but the law according to Bacon looks to the original motive as governing liability for the whole state of facts.<sup>2</sup> You can hardly bring this case under the maxim by saying that the natural and probable result of A's trying to kill B is that he will kill him in self-defence.

It is true, however, that even in the strictest sense the matter of proximate cause may be involved in a criminal matter. Thus an indictment sometimes fails upon the ground of remoteness.<sup>3</sup> For example, the trustees of a public road were indicted for causing the death of a traveller upon the way caused by their failure to repair the road. The court, however, held that the indictment was bad because the neglect must be their personal neglect and death must be the immediate result of that neglect.<sup>4</sup> Campbell, C. J., observed that on the theory of the prosecution if a town failed to repair a road, and a traveller thereon was killed, all the inhabitants of the town would be guilty of manslaughter. On the other hand, the contributory negligence of the deceased is no defence to the indictment if in fact the negligence of the prisoner was a proximate cause of the death.<sup>5</sup>

Considering the criminal law as we find it above, it appears that one must be a proximate cause of an injury to be liable for it ; but if a certain intention has prevailed through a series of acts, that binds them together in such a way that the whole makes the doer proximate to the final result. The parts are looked at (*spectantur*) as one act from motives of public policy.

If we consider other systems of law in other countries we find that one is often held liable for acts of which one, physically speaking, has not been a proximate cause or indeed a cause at all, except as an unfortunate part of the causal nexus of the world at the time the event happened. This shows still more clearly how the pur-

<sup>1</sup> 7 Bacon's Works, 329.

<sup>2</sup> 1 Hawk. P. C. 87. But see 1 Bishop, Criminal Law, §§ 850, 869; *Stoffer v. State of Ohio*, 15 Oh. St. 47; *Ingram v. State*, 67 Ala. 67.

<sup>3</sup> Broom, Legal Maxims, 6th ed., 223.

<sup>4</sup> *Reg. v. Pocock*, 17 Q. B. 34, 39; *Reg. v. Hughes*, Dearb. & B. 248. Cp. *Reg. v. Gardner*, *ibid.* 40; *Reg. v. Martin*, L. R. 1 C. C. 56.

<sup>5</sup> *R. v. Swindall*, 2 C. & K. 230; *R. v. Jones*, 11 Cox 544; *R. v. Rew*, 12 Cox 355.

pose of public policy works on the physical world to create liability which shall enforce its own will.

Dr. Post<sup>1</sup> says that the idea that only the actual disturber of the social equilibrium can be punished is very modern, and is a product of the modern state; that it is wholly foreign to other social systems, especially the tribal or clan organization.<sup>2</sup> From the more primitive point of view a breach of social order is equally reprehensible whether it proceeds from intention or from chance; and this is entirely a broader matter than questions like negligence in modern law. Thus among the Papuans of New Guinea a killing is punished without the least inquiry as to the state of mind of the killer. The same is true among certain tribes of the Mongolians, Tartars, Bareans, Gold Coast and Congo natives, and the early Irish.<sup>3</sup> Conversely if the state punishes by chance the wrong man, according to the Moslem code it must compensate the relatives of the sufferer out of the public treasury.<sup>4</sup>

Dr. Post says: "*Es ist ein ganz allgemeines geschlechterrechtliches Prinzip, dass alle Verpflichtung zum Schadenersatz auf dem objektiven Kausalzusammenhang beruht, während das subjektive Verschulden gleichgültig ist.*" Thus among the East Indians whoever sells a noxious drink is liable for all damage which may be caused thereby.<sup>5</sup> We have seen above that the same thing is true to-day in modern law; but we invent as a reason for the rule that the one selling is presumed to foresee that damage may result and is held to intend it, while the more primitive peoples look simply to the antecedent actor without any reference to the probabilities or the state of mind of the guilty person.<sup>6</sup> Nor is the penalty confined even to the antecedent actor. In Moslem law if one pushes another off of a high place and the falling man kills a third person, the family of the one who was pushed off is held responsible, although they have an action over against the one who did

<sup>1</sup> Judge of the Supreme Court at Bremen.

<sup>2</sup> 2 Grundriss der Ethnologischen Jurisprudenz 214.

<sup>3</sup> Kohler, 7 Zeitschr. vgl. Rsw., s. 377.

<sup>4</sup> 2 Post, op. cit., 215.

<sup>5</sup> Kohler, 7 Zeitschr. vgl. Rsw., s. 383.

<sup>6</sup> "Die Versuche der Germanisten, diese Thatsache dadurch zu erklären, dass man in solchen Fällen einen verbrecherischen Willen fingire, sind vom ethnologischen Standpunkte aus unhaltbar. Wie weit die w eigentlichen Wurzeln solcher Rechtssätze zuruckliegen und wie wenig sie unter moderne Begriffe gefasst werden dürfen, kann man daraus sehen, dass bei westäquatorialafrikanischen Stämmen das Kasualdelikt auf einem Thater innewohnende Zauberkraft zurückgeführt wird, deren nichtvorhanden sein er durch ein Ordal darthun muss." 2 Post, Afrik. Jurisp., s. 29.

the pushing.<sup>1</sup> So if a child is frightened by the sight of a sword and falls into the water the owner of the sword is held liable.<sup>2</sup>

As the tribal status begins to disappear the idea that the doer of the act is the only person liable begins to emerge from the chaos. The person physically causing an injury is still liable, but the penalty is lighter for accidental actions, and in the case of unintentional injuries the corporal punishment gives place to the principle of damages.<sup>3</sup> This, for example, is generally true in Chinese law to-day,<sup>4</sup> and although there are instances in Japanese law of liability for accidental injury, still in the later Japanese law the tendency is to analyze the intentions of the prisoner.<sup>5</sup> In Aztec law the earlier doctrine has entirely disappeared,<sup>6</sup> while in Montenegro the absence of intent to injure is a ground for mitigation.<sup>7</sup>

So, in general, the principle of liability only for intended wrongs is gaining ground, although where the former principle survives the penalties are still severe.<sup>8</sup>

In the tribal state of society no distinction was made between intention and negligence, or between negligence and accident. This was true of the early German, the Greek, and the Roman law,<sup>9</sup> also of the Aztec and Frankish codes,<sup>10</sup> although in the last intentional wrongs were more severely punished than negligent ones.

Of course the attempt to connect responsibility with some acting human will fails, not merely where the results are due to some outside cause which produces the results without reference to or even in spite of the will in question; but likewise wherever the will, though present and active, is not to be regarded as properly a human will at all. Thus insanity, irresistible impulse as in the case of self-defence, drunkenness, being bewitched, extreme youth or senility, illness, have been at all times in varying degrees excuses for injurious action. Sex has also at times been a defence

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<sup>1</sup> Kohler, *Blutrache*, s. 23.

<sup>2</sup> *Ibid.*

<sup>3</sup> 1 *Bausteine* s. 150; 2 *Afrik. Jurisp.*, s. 28, 29.

<sup>4</sup> Kohler, *Chines. Strafr.*, 23, 24.

<sup>5</sup> Kohler, 10 *Zeitschr. f. vgl. Rsw.*, 389-391.

<sup>6</sup> Kohler, *Recht der Azteken*, 81.

<sup>7</sup> Popovic, *Recht u. Gericht in Montenegro* (1877), 58.

<sup>8</sup> *Islamitisches Recht*; Kohler, *Blutrache*, 23. In the Japanese criminal code of 1871 an accidental injury to one's parents is severely punished. Kohler, 10 *Zeitschr. f. vgl. Rsw.*, 389-391.

<sup>9</sup> Dareste, *Étud. d'hist. du Droit*, 200; 2 Brunner, *deutsche Rechtsgesch.*, 545.

<sup>10</sup> Kohler, *Recht der Azteken*, 80, 81; Schröder, *deutsche Rechtsgesch.*, 344, 345.

either in formal law or in the practical application of it. This is shown by the fact that even in Massachusetts, where a woman is legally as responsible for a murder as a man, there has been no woman hanged for murder since 1800.<sup>1</sup>

It would serve no useful purpose for the present discussion, and would take us too far afield, to go into the extent to which the matters above mentioned have been considered at various times and in various countries defences to civil or criminal liability for injuries.<sup>2</sup> The principle is in each case that if the will producing the act in question can be considered a responsible human will, then it is a proximate cause of the injury and liability follows. Whether it can be so considered depends upon a great variety of historical considerations, many of them reaching back to the early times of history. A comparatively modern instance is that of witchcraft. A witch was held to be the proximate cause of all sorts of things, from the souring of cream to the death of a human being, and this although she was assumed to have sold herself to the devil in such a way as to be no longer a free agent.<sup>3</sup> The important thing was the prevention of witchcraft, and a witch was held responsible for acts done much as a man who gets drunk, knowing he may do all sorts of things while in that state, is held liable, or much as an infant or a lunatic is held civilly liable for injuries committed by him.

Thus we see that both in criminal law and in civil law, both in early times and in modern times the human will, which must be found as the proximate cause in all cases, except as we saw in insurance cases, is not always the actual human will existing, but a more or less constructive or imputed will, created by the law with reference to the needs of the particular community. If such a will, whether actual or imputed, can fairly be said to be the efficient cause of matter in question, it is the proximate cause. In this respect the *spectatur* never varies; but the *spectatur* obtains its interest, its continuity with the rest of the law, in defining, according to considerations arising from other branches of the law, what shall be considered a responsible human will.

It may be noted that thus far the whole talk has been of injuries and damages. Logically there seems to be no reason why the principle of proximate cause should be so limited to negative results.

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<sup>1</sup> Report of Atty. Genl., 1899, p. xv.

<sup>2</sup> For primitive law see 2 Post, Grundriss der Ethn. Jurisp., 219-224.

<sup>3</sup> Lea, Superstition and Force.

Suppose one does something of benefit to another and the natural and probable result is a further benefit not originally actually contemplated, is not the benefactor the proximate cause of this also? Unquestionably this is so from a logical point of view, but the doctrine seems not to have been legally embodied, unless it can be so considered from the point of view of *compensation*. One may sue, for example, in certain cases in *quantum meruit* or *quantum valebat* and recover what the goods or services in question are "reasonably worth." This expression "reasonably worth" in a certain sense is a measure of the chain of effects in much the same way that in torts the line is drawn between proximate and remote damages. As a matter of fact, all the effects are looked at in estimating the value of the transaction. It is true all the elements of value are not perhaps contemplated by the doer any more than the injuries were in the other case, but the fiction of constructive intention is implied in the idea of compensation, for the benefit must in a sense have been contemplated in order to be the "act" of the doer which deserves compensation.

In a loose and popular sense we often hear benefits apparently remote ascribed to some person. Thus one who has been saved from a life of drunkenness or dissipation through the influence of A, or has been cured of an apparently fatal illness through the efforts of B, is often heard to say that A or B "was the cause of my fortune," or "I owe my life and my success" to A or B. Here the effects may last over a long series of years, and yet although a human will has intervened, namely the will of the person benefited, he does not hesitate to ascribe the benefits to A or B, who perhaps could not foresee them at all, although they fell within the general scope of his benevolent purpose.

It has been suggested to me that the law of property might furnish a further example. Suppose, for instance, I make a man a present of a fruit tree, or if I give him cattle or sheep, is he not entitled to their increase? And in the Old Testament is not Jahveh continually blessed on this very account as the cause of accumulated prosperity? It may be observed in this last case that Jahveh is the giver of the increase separately through the doctrine of continual exertion of power in perhaps most of the instances which could be cited. But it may be admitted that apart from this, the notion that one who sets in motion a series of causes is responsible for the total result seems to be implied. There seems to me, however, to be no question of proximate cause in these cases of property rights. From the mechanical point of view the

cause of the fruit is the tree, the soil, etc., and the cause of the lambs and calves is their parents. On the other hand, if we consider the "natural and probable result" doctrine as we have seen it in torts, there is a difference between torts and property. In torts certain things happen in the time process, the runaway horse knocks down the traveller, the poison carelessly sold is taken by the sick person. In property something likewise happens in the time process, viz. the increase of the property; but in contemplation of law nothing happens to the right of ownership, which is the "effect" whose cause we are considering. Whatever rights to the increase of the flock exist at all in B exist at the time the flock is handed over by A. It is true there is nothing in existence then to which the rights may attach, but there is but one act of transfer of ownership. It may be argued that a tort case is strictly parallel, for the man who was knocked down by the horse might not have been in the street at all when the horse started to run, but in his house or other place of safety, yet the law regards the whole transaction as proximate effect. But the idea of necessity is involved in the tort case, while in the property cases the whole *dominium* which is transferred has for its leading idea freedom from the will or act of the donor in every possible sense. The fig-tree may be cut down or left; the cattle may be bred or turned into beef and mutton, and in either case the intervening will of the donee of the property is supreme.

Let us now turn our attention to some other departments of life and see what analogies can be found there to our doctrine. The most natural field in which to look for a doctrine intended to be ethical is that of religious and moral law. What is the proximate cause of a virtuous action or of a sin?

Let us first take up the moral law in the region where it has been most largely reduced to a crystallized system, viz. in the juristical works and decisions of the Roman Catholic church. It is interesting to note that the system of questions to and decisions by the higher tribunals of that church gives rise to results not unlike those of the English common law with its accumulations of decided cases. For, unlike the civil tribunals in the countries using the Roman Law, these decisions are accompanied by a short statement of the reason for them, and are published in full for the guidance of priests and others having occasion to consult them. I shall refer only to the well-known work of Gury on Moral Theology.<sup>1</sup>

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<sup>1</sup> *Compendium Theologiae Moralis*, by Joanne Petro Gury, S. J., Professor in the Roman College, 4th ed., Rome, 1852.



The principal difference between human law and the law of the church is<sup>1</sup> that the former can command what it will by virtue of its own nature, and can impose penalties, for the authorities have been ordained of God with the power of laying down rules ;<sup>2</sup> while the ecclesiastical law can render liable only for guilt. To apply this to an injury by one man to another : that it may be a case where "restitution," *i. e.* compensation, is morally necessary, the act complained of must be (a) *Injusta*, *i. e.* some right must be violated, (b) *Causa damni efficax*, *i. e.* it must be one resulting in injury, and one which can be imputed to the doer, (c) *Theologice culpabilis*, for there can be no obligation to make reparation in the forum of conscience unless an injury has been committed in the same forum. Thus idiots and somnambulists cannot be morally liable for their acts. Moreover, there can be no injury inflicted in a moral sense where there is no intention to injure ; "*ad injuriam enim requiritur intentio nocendi saltem indirecta, seu praevisio damni injusti, saltem in confuso.*"<sup>3</sup>

It thus appears that the doer must not only be the proximate cause of an injury, but must have an intention to inflict a wrong. But, as the last quotation would indicate, this intention need not always be direct. Thus "*voluntarium indirectum illud est quod non intenditur in se, sed in alio directa volito, hoc est quod in causa vel in effectu habetur.*"<sup>4</sup> There are various kinds of "*voluntarium indirectum*," e. g. "*Proxima vel remota prout valde probabilem connexionem habet cum effectu in mente agentis vel parum probabilem.*" Thus often *blasphemiae impudicitiae, rixae aut injustitiae* are voluntary which are done in a state of intoxication because they can often be foreseen by the drinker, and in fact may be sufficiently foreseen from the habit of doing such things in this condition. Thus they are sinful. But the leader of an army who burns a field or a fortress is not liable though innocent third persons suffer, for this is only *per accidens*. Nor a priest who ignorantly gives the sacrament to a sinner, nor one who having no other place to get money borrows from a usurer at an exorbitant rate of interest, for that is the sin of the usurer.<sup>5</sup>

In general a triple condition must obtain for one to be morally wrong :<sup>6</sup>—

(1) The doer shall have foreseen the evil result at least *in confuso* ; for an effect in no wise foreseen cannot be voluntary.

<sup>1</sup> Op. cit., c. v., De obligatione Legis.

<sup>2</sup> Rom. xiii. 2.

<sup>3</sup> Op. cit., sec. 633.

<sup>4</sup> Op. cit., sec. 6.

<sup>5</sup> Op. cit., sec. 8.

<sup>6</sup> Op. cit., sec. 7.

(2) That it was possible for him not to do it, for otherwise the will would be lacking.

(3) That he is not to be held liable merely by reason of a bad result where he is in the exercise of his rights, and the result is therefore excusable. Conversely one may be a well-doer, although from his action an evil effect may follow, if the following conditions are present:<sup>1</sup> (1) if the purpose of the doer is good; (2) if the *causa* is in itself good or indifferent; (3) if the good effect follows as immediately from the cause as the evil effect; (4) if the good effect at least offsets the evil effect.

We see from these extracts that the doctrine of proximate cause in the law of the church is very similar to that of the law of the state, the principal difference being that in the former more emphasis is laid upon actual intent and less use is made of a fictitious and imputed intent. This has been expressed by another religious writer as follows: "A whole act includes its motive. An act of yours is not simply the thing you do. It is also the reason why you do it."<sup>2</sup> To be morally wrong an action must be (1) unjust, (2) harmful, (3) proceeding from an evil intent. Thus sleeping persons are not liable for their actions because there is no intention to do wrong.<sup>3</sup>

But, as we have seen above, the fact that a given result can be reasonably foreseen is enough to create liability in the moral sphere, although the result was not directly intended. This is brought out further in the chapter in Gury's book, "*De Radicibus Restitutionis*," or "Elements of (moral) Damages." He says:<sup>4</sup>—

"Injustus damnificator restituere tenetur; v. g. si quis domum alterius culpabiliter incendat, integrum ejus pretium domino rependere debet. 2°. Totum aequivalens damnis praevisus praeter rei damnificationem, si quae ex ea provenerint. Sic v. g. si opifex solitam operam aliquo tempore omittere cogatur ex eo quod instrumentum ei necessarium destruxeris, illum de luco cessante teneris compensare."<sup>5</sup>

On the other hand, a general intention to do wrong is sufficient. Thus if I intend to burn A's house and by a mistake burn B's, I am morally liable, for the three elements of invasion of right, injury, and evil intent are present.<sup>6</sup>

Just how far theologians are willing to go in the matter of con-

<sup>1</sup> Op. cit., sec. 7.

<sup>2</sup> 4 Phillips Brooks, Sermons, 238.

<sup>3</sup> Gury, op. cit., sec. 633.

<sup>4</sup> Op. cit., sec. 632.

<sup>5</sup> Cp. Ezech. xxxiii. 14, 15; Epist. Jas. v. 4, St. Augustine ad Macedonium says: "non remittitur peccatum nisi restituatur ablatum — cum restitui potest."

<sup>6</sup> Gury, op. cit., sec. 638.



structive intent seems somewhat uncertain. For instance, this question is put :<sup>1</sup> shall a man be held to make restitution, who, by his bad example, has induced others to do injury, and who might well have foreseen the efficacy of his bad example ?<sup>2</sup>

Let us go a step further and consider the question of intent from a purely ethical standpoint. According to Kant the only source of virtue is the good will, and an action can be virtuous *only* when performed from fidelity to the imperative. The principle may be paraphrased in legal terms somewhat as follows: Whatever action proceeds from a virtuous will is a proximate result of such a will, and we may call it good.<sup>3</sup> Where a vicious inclination to do the same thing enters in, then (according to Kant) there is moral contributory negligence, or, if you choose to split up the agent's personality, there is an intervening human agency. For by the interposition of an independent (vicious) motive the causal connection between the good will and the act is interrupted.<sup>4</sup>

Some legal and most ethical writers claim, however, that a vicious will does not prevent an action from being virtuous—at least to some extent, unless it is the proximate cause of such action.<sup>5</sup> In other words, we may have the same case with motives that we had in the marine insurance cases where two contemporaneous causes occur, and where we have to consider which is on the whole the more efficient and call that the proximate cause. Thus if the good impulses to an action constitute 70 per cent. of the “spring,” as Martineau calls it, the action would be called virtuous in spite of the 30 per cent. of selfish or other bad motives. Kant's position, if I understand him rightly, is much more like the pre-

<sup>1</sup> Op. cit., sec. 642.

<sup>2</sup> “I. Sententia *probabilior negat* quia ille qui dat pravum exemplum non est causa damni sed mera occasio. — S. Lig. n. 537 (St. Liguori, founder of the order of the Redemptorists in 1732; author of *Theologica Moralis*, etc.) — Salm, Layman, Sauchez, etc.”

“II. Sententia *affirmat* quia praebeens malum exemplum sua praevisio contagionis, est vere et proprie causa efficax damni. Billuart, Antoine, Cuniliati, etc.”

<sup>3</sup> “The proper and inestimable worth of an absolutely good will consists just in this, that the principle of action is free from all influence of contingent grounds, which alone experience can furnish.” *Grundlegung*, 53. Cp. Seth, *Ethical Principles*, 165; Martineau, *Types of Ethical Theory*, 45–77; Paulsen, *Ethics*, 194.

“The worth of a man depends on his *will*, not on *knowledge*, as aristocratic and self-conceited culture believes—that is the cardinal doctrine upon which Kant's entire philosophy really turns.” Paulsen, *Ethics*, 200.

<sup>4</sup> Cp. Wharton on Negligence, sec. 300; Pollock on Torts, 380; Kant (Rosenkrantz), *Grundlegung*, 46, 48, 53.

<sup>5</sup> See note to *Freer v. Cameron*, 55 Am. Dec. 668–670; Thompson on Negligence, 1–1155.

vailing legal disfavor of the doctrine of comparative negligence.<sup>1</sup> We can suppose a man on trial at the judgment seat of God claiming to have a certain action counted in his favor. He sets forth a certain good purpose he had in regard to this action, whereupon the devil's advocate points out certain sinful motives which likewise contributed to the performance of the action. According to the present legal doctrine the devil has won his case, for the least negligence or sin in his intention prevents his reward. He who would be virtuous must cast the mote out of his own eye, must observe each tittle of the law, must be a spotless sacrifice, else his labor is vain. Each word of his pleadings must be technically perfect or his case fails. Such I understand to be Kant's view. The other view is much more in accord with the modern equitable notions of set-off. One of the earliest cases in which the question of proximate cause was raised is undoubtedly the account of the Fall. This presents two points. Adam broke what was practically a statute and on modern legal principles he must have been held to have intended all he did, *i. e.* his evil will was the proximate cause of his eating the apple. He set up in his defence the independent will of Eve in tempting him; and she in turn set up the independent will of the serpent in tempting her and in leading her to tempt Adam. But, as we have seen, the two presumptions that one is expected to know the statute law and to intend the consequences of his action are absolute, and neither Adam nor Eve was allowed to plead temptation as an excuse. Adam was condemned on two grounds: first, for breaking the law; and second, for listening to Eve's temptation; and he and his descendants were condemned to perpetual hard labor. His expulsion from paradise was not a part of his punishment, but merely a preventive measure designed to deprive him of the chance of acquiring immortality as well as knowledge.

Eve and the serpent were likewise condemned, each for a separate fault, and the relations between them neither increased nor excused the punishment. In other words, when the statute is plain the imperative is absolute. Just as imperative as, for example, that requiring a ship-owner to detain immigrants about to be deported at his peril, and not merely to do all he can to detain them.<sup>2</sup>

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<sup>1</sup> The doctrine is followed only in Ala., Ga., Ill., Kas., Neb., and Tenn., usually with the addition of degrees of negligence. It has been disapproved in Pa., N. Y., Mass., Ia., Wis., Md., N. J., Tex., Mo. For cases see Buswell on Personal Injuries (1893), § 102.

<sup>2</sup> Act Mar. 3, 1891, sec. 10. U. S. v. Warren, Cir. Ct. Mass. 1895. Cp. U. S. v. Spruth, 71 Fed. Rep. 678.

As to the question of reward or merit, the question of intent has been much debated. Is that man virtuous who acts in a virtuous manner without willing to do so, or he who wills fiercely and perhaps fails? "Who knows what scant occasion gave the purity ye pride in," says Burns, implying that, as Kant holds, the good will is the only proximate cause of true virtue. Is the tree always known by its fruits, can we say that certain results are always proximate to a certain kind of cause?

Of course the same ethical question is presented in many ways. The scholastic and jesuitical disputes as to when deceit may be excusable through the presence of some outside force such as a set of circumstances, where telling the truth would work a certain kind of injury to the speaker or to other persons, is analogous to the use of force in self-defence or in carrying out the purpose of the law. In such a case there is no doubt that A is the proximate cause of a certain falsehood and yet according to some *non spectatur*. Or as Martineau puts it: Can general rules bind against their *raison d'être*?<sup>1</sup> One of the most concise discussions of this question is of course Kant's famous essay, *Ueber ein vermeintes Recht aus Menschenliebe zu lügen*.<sup>2</sup> He says:—

"Whoever tells a lie, however good his intentions may be, must answer for the consequences of it, even before the civil tribunal, and must pay the penalty for them, however unforeseen they may have been, because truthfulness is a duty that must be regarded as the basis of all duties founded on contract, the laws of which would be rendered uncertain and useless if even the least exception to them were admitted."

If we go into the field of optics we find several illustrations of one aspect of the doctrine of proximate cause. This aspect, as might be supposed, has to do with the "*spectatur*." In order to determine responsibility a vast number of attendant circumstances are excluded. So in physical vision, to see any object clearly the attention and focus of sight must be fastened upon the object in question to the exclusion of much beside. On the other hand, as in telescopes and field glasses, the field of vision must be large enough to let in sufficient light. If you look at an illuminated object through a very small aperture you cannot see it as distinctly as through a larger one. So the law must look at enough of the facts of any case to have proper illumination of the principal object of its search. On the other hand, it is important to shut out

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<sup>1</sup> 2 Types of Ethical Theory, 353.

<sup>2</sup> (1797) 7 Rosenkrantz, 295.

irrelevant facts, and so an artist will look between his legs or through his hands to get a better estimate of certain values.

We may now sum up what we have learned of proximate cause as follows: From a legal point of view it is of two kinds (1) as in insurance cases, (2) responsibility for a wrongful act whether in tort or contract.

"The fundamental difference between these classes is that in the former investigation ceases when the nearest cause adequate to produce the result in question has been discovered, while in the latter the object is to connect the circumstances which is the subject of the action with a responsible human will."<sup>1</sup>

In other words the doctrine takes two forms. The first is in the field of mechanism or necessity and in the time process. We regard the continuous stream of causation in question and go upstream in our search until we find a spring which can properly be called its source. The question is one of fact, of adequacy to produce the result in a mechanical sense.

In the other field we are dealing with teleology, with purpose, with a human will, actual or constructive, with a world of freedom not of necessity.

Historically it seems probable that the existence of these two aspects of the idea of cause is, partly at least, a question of terminology. *Causa* in Latin meant both cause and reason. "Cause is the condensed expression of the factors of any phenomenon, the effect being the fact itself."<sup>2</sup>

"Of these two senses of the word 'cause,' viz. that which brings a thing to be and that on which a thing under given circumstances follows, the former is that of which our experience is the earlier and more intimate, being suggested to us by our consciousness of willing and doing."<sup>3</sup>

The attempt to refer events to a responsible human will, which we have seen stated in legal terms several times in this paper, is part of a general tendency to consider events from a strictly human point of view. You ask what is the cause of a monument and you find a man had a purpose.<sup>4</sup> You ask what turns a wheel, later you find a man. Then you go away and say: everything is like that

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<sup>1</sup> Adapted from language of note to *Gilson v. Delaware, etc., Canal Co.*, 36 Am. St. Rep. 807.

<sup>2</sup> 2 G. H. Lewes, *Problems of Life and Mind*, iv., sec. 19.

<sup>3</sup> J. H. Newman *Grammar of Assent*, 65.

<sup>4</sup> So in the case of a scarecrow. Grote, *Phaedo*, ii.

wheel ; if I investigated enough I should always find a man at the handle. And the man at the handle or whatever corresponds to him is from henceforth known to you as "cause."<sup>1</sup> This may be said to hold true even in marine insurance cases. For the cause of a disaster is deemed to be either the will of a human person or of a divine intelligence, as is shown in the expression "act of God."

*Prescott F. Hall.*

89 STATE ST., BOSTON.

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<sup>1</sup> 1 W. K. Clifford, Lectures and Essays, 149.

# HARVARD LAW REVIEW.

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JAMES BRADLEY THAYER, Weld Professor of Law at Harvard University, died at his home in Cambridge on Friday, February 14, 1902, at the age of seventy-one; laying down his tasks quietly after only a single day's cessation from his usual labors. He had been a member of the faculty of the Law School for over twenty-seven years, and nearly all the students who have been graduated from the school during that period, may be counted among his pupils. The qualities which his large-minded modesty could not conceal, his thoroughness of method, his painstaking accuracy, his practical good sense, his easy and familiar handling of large subjects, his broad and deep scholarship, have impressed and moulded thousands of students; and the members of his classes have begun or will soon begin the practice of a responsible profession, better fitted for its duties and more likely to discharge them honorably and thoroughly because of Professor Thayer's teaching and example. Those members of the school who came by chance into relations with him somewhat closer than those of the lecture room, found him hospitable, genial, kindly, and patient, apparently never weary of rendering to the student any assistance in his power. Increasing acquaintance served only to deepen the impression first made, that here was the brain of an intellectual master and the heart of a strong, simple, true man.

His services as citizen, teacher and author are too large to be here critically estimated. The REVIEW is very greatly in his debt, both for the many scholarly articles from his pen which have appeared in its pages, and for the advice and assistance so often asked and so freely given. In acknowledging this debt, the editors may perhaps not improperly add a word in the name of the students of the school, to voice the admiration and respect, the sincere appreciation and the keen personal regret which are felt by those who were under his instruction.

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**THE DISCRETION OF THE MUNICIPAL EXECUTIVE IN THE ENFORCEMENT OF CRIMINAL LAWS.** — The current discussion about the enforcement of criminal laws in New York City involves the question whether the mayor possesses any discretion in the administration of such laws. It seems to be contended by many that, under all circumstances, the executive is bound to enforce the laws strictly and without discrimination. It is submitted that this is a mistaken view, and that under certain conditions a considerable amount of discretion must rest with the mayor. If, for instance, there are more criminal statutes than the administration is able to enforce strictly, or if the strict enforcement of one law would result in the neglect of other duties, there must be some official to decide which laws shall first receive attention, and in what manner all the laws shall be enforced. The head of the executive department of the municipality would seem logically, if not necessarily, the person to make this decision. If, in New York City, the laws are so numerous that the strict enforcement of a statute declaring Sunday liquor-selling a *malum prohibitum* can be obtained only by neglecting the suppression of murder, robbery, assault and kindred crimes, *mala in se*, which result in a breach of the public peace, it would seem to be the wise and proper course for the mayor to direct the activities of the administration primarily toward the matters of most vital concern to the community. Whether such a situation exists, and, if so, what is the proper policy for the executive, are political questions the decision of which must necessarily be left to the officer who possesses the power of discretion — namely, the administrative head of the municipality.

This raises the further question as to the extent of his power, in cases where local authorities are entrusted with the enforcement of a general law. The "Liquor Tax" Law, about which interest is centred, is a general statute, and in its provisions forbidding Sunday sales is of universal application throughout the state. 1896 LAWS OF NEW YORK, Vol. I, 112, § 31 a. Its enforcement, however, is placed in the hands of locally elected officials. These officers as a matter of fact are practically independent of central control. See 1 GOODNOW, COMP. ADM. LAW, 228. In New York, to be sure, the chief municipal and county officers are subject to removal by the governor. 1897 LAWS OF NEW YORK, Vol. III, 378, § 122. But this power is rarely exercised except in cases of corruption, or conspicuous misconduct in office. As a result, while they are in a sense state officials, municipal officers are responsible primarily to the voters of the city for their enforcement of the laws. It is obvious that when there is a strong public sentiment against strict enforcement of certain laws, the administration will reflect this feeling of the local community, however stringent may be the terms of the general statute. The result is much the same as if local option were allowed in the enactment of the laws. The chief objection to this method of securing local option is that the habitual non-enforcement of certain laws in a community tends to create contempt for law in general. It is submitted that, whatever its weight may be, this argument is one which should be addressed to the legislature to induce a grant of the local option system of legislation, rather than to the local executive, to restrain him from a liberal enforcement of existing laws.

There is also a second class of statutes the enforcement of which must be left to the discretion of the mayor. Many statutes are never strictly enforced and are probably not intended to be — such as anti-trust laws



and the recent New York Tenement House Act. In this class of statutes, it is practically impossible for the legislature to lay down a clear line between cases of legality and illegality; a rule is adopted broad enough to cover all cases, but the law is to be enforced only when the good sense of the executive prompts him to act. As such laws do not differ in appearance from those requiring strict enforcement, it must be for the executive to decide to what class each statute belongs, and the power of discretion thus placed in his hands is very wide. It may be that liquor laws are not within the class which requires liberal enforcement, but this is a political question to be decided by the mayor, who is responsible primarily to the people of the city for the wisdom and good sense of his decision.

This brief consideration of the necessities and results of our system of local administration seems to make it clear that, in the present situation in New York City, the mayor should be regarded as possessing the right, in the enforcement of criminal laws, to exercise a wide discretion; though the exact limits of that discretion are perhaps somewhat difficult to define.

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STATE REGULATION OF RAILROAD RATES AS AFFECTING INTERSTATE COMMERCE. — Two recent decisions of the federal supreme court deal with the effect of the commerce clause of the federal constitution upon the powers of the states to regulate railroad charges. A constitutional provision of Kentucky forbids a carrier, except by permission of a railroad commission, charging more for a short than a long haul within which the short is included. Actions were brought for violations of this provision. In one case both the long and short hauls were within Kentucky territory, and it was held that although the enforcement of such a regulation under those circumstances might somewhat affect interstate rates the result was too indirect to constitute an interference with interstate commerce. *Louisville & Nashville R. R. v. Kentucky*, 22 Sup. Ct. Rep. 95. In the second case the short haul was from Franklin, Ky., to Louisville, Ky., and the long haul for which less was charged was from Nashville, Tennessee, to Louisville, both hauls being in the same direction and the former included within the latter. The railroad alleged that the lower rate from Nashville was necessitated by water competition between that point and Louisville, that the charge from Franklin was reasonable, and that if compelled to equalize the two rates it would raise the Nashville rate. The court held that under these circumstances the state regulation amounted to an interference with interstate commerce, and was invalid. *Louisville & Nashville R. R. v. Eubank*, decided January 27, 1902. Justices Gray and Brewer dissented upon the ground that the state had a right to fix the rate from Franklin to Louisville, and in adopting a standard might select the rate fixed by the carrier itself for longer hauls over the same road and that in so doing the state was regulating local rates rather than the standard.

The two cases illustrate the difficulty and delicacy of the question that arises where the exercise by the state of its power to regulate rates affects interstate commerce. It is obvious that all state regulation of common carriers in some degree influences interstate commerce, and it is well settled that a merely incidental effect upon that commerce will not invalidate the regulation by the state of public corporations



doing business within its limits. *Louisville & Nashville R. R. v. Kentucky*, 161 U. S. 701. On the other hand the state cannot in its regulation of railroad charges interfere in the rates for transportation between points within and without its own territorial limits. *Wabash, etc., R. R. v. Illinois*, 118 U. S. 557. In the case of *Louisville & Nashville R. R. v. Eubank*, *supra*, the state regulation of local charges is held invalid because the manner of such regulation will presumably affect the interstate rates of the carrier. Upon principle it would seem clear that the interference with interstate commerce should be very direct in order to set aside a regulation by the state of its domestic concerns. An enforced reduction of local rates will often compel a carrier to raise interstate rates in order to reap the accustomed profit, but such an effect upon interstate commerce would clearly be too remote to constitute an interference. The regulation that the carrier maintain a certain ratio between his state and interstate rates undoubtedly has a more direct effect upon interstate commerce, and judicial opinion may well differ as to whether the effect is sufficiently direct or not.

One consideration tending to negative the assumption that the interstate rate of the carrier will necessarily be affected by the provision in question appears not to have been noticed by the court. If as alleged the Franklin rate is reasonable and the Nashville rate is forced upon the carrier by water competition, it would seem to be a proper case for an application to the railroad commission for permission to maintain the existing rates or at least for relief from the letter of the requirements of the law. It is not to be assumed that such permission will wrongfully be refused. Moreover in case of an arbitrary refusal and the establishment of a local rate that is practically confiscatory, the carrier may avail himself of the Fourteenth Amendment and appeal to the federal courts. If this suggestion is sound it would seem that the assumed directness of the effect of the long and short haul provision upon the interstate rate is not entirely warranted, and that the protection of the carrier lies in the Fourteenth Amendment rather than in the commerce clause of the federal constitution.

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**UNAVOIDABLE FAILURE OF SUPPLY AS EXCUSE FOR PUBLIC AGENT'S REFUSAL TO SERVE.** — Is a corporation, which exercises the right of eminent domain and holds itself out as ready to furnish the public with a certain commodity, justified in refusing to serve new customers on the ground that such additional service would reduce the supply to the prior consumers below their reasonable requirements; or, having a limited supply, is the company bound to divide it equally among all members of the public who may wish to demand a share, regardless of the priority of application? The question in this precise form has not arisen with much frequency, possibly because the public agent in most instances has the ability to increase its supply to meet the demand and under such circumstances is held liable for failure to do so.

In a recent Indiana case a company had been organized for the purpose of furnishing natural gas for fuel to the citizens of Indianapolis. A property owner applied for a connection between her dwelling and the gas main, and the company refused on the ground that through unavoidable causes the supply of gas had failed to such an extent that

there was no more than sufficient for its present consumers. Under these circumstances the court issued a *mandamus* compelling the company to make the connection. *State ex rel. Wood v. Consumers' Gas Trust Co.*, 61 N. E. Rep. 674. It is argued that the appellee in consideration of the extraordinary powers granted to it by the state, has undertaken to bring to the community a public benefit; that this benefit is for all alike who may wish to avail themselves of it; that "there can be no such thing as priority or superiority of right among those who possess the right in common;" and that a refusal by the appellee would be unjust discrimination against the relatrix.

It would seem that the court by a recognition of the settled rule in an apparently analogous class of cases might logically have reached a different conclusion. If a railroad, owing to an unusual influx of business, is unable to furnish sufficient cars for handling the freight, it may refuse to receive it without incurring liability. LAWSON, RTS., REM. & PRAC., § 1804. In such cases the carrier is not compelled to give the latest shipper a share of the accommodations and thereby proportionately diminish those of earlier shippers, but is allowed to carry in the order of presentation. Here the courts seem to recognize a priority of right which the principal case denies. The railroad is justified in refusing for the time being because its facilities have without its default become inadequate. In the principal case the failure of supply was likewise unforeseeable. In the one the impossibility is temporary, in the other permanent: a difference in degree, but apparently not a difference in kind. If the excuse is good in the former, it would seem to be good in the latter also.

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REDUCTION OF DAMAGES ON ACCOUNT OF BENEFITS. — A rather novel point in the measure of damages has been recently presented. The *Acanthus* injured another ship in a collision. The liability was admitted, and the injured ship was dry docked for repairs. While in dry dock, the owners improved the opportunity to have her bottom cleaned and painted, and her bilge keels fitted, steps which they had contemplated before the collision but had not decided upon. This in no way interfered with the repairing, and did not detain the ship in dry dock any longer than it would otherwise have remained. Upon receipt of the bill for repairs and dry docking the owners of the *Acanthus* claimed a reduction of the dock charges on account of the facts above stated. The owners of the injured ship sued, and it was held that no reduction should be made. *The Acanthus*, 112 L. T. 153.

Notwithstanding the seeming fairness of the defendant's claim, there seems to be no ground of *quasi*-contract, on which to allow a reduction in the nature of a counter claim for the benefit of dry docking. There has been no unjust enrichment of the plaintiff at the expense of the defendant, since the defendant has not been compelled to pay any more than he would if the plaintiff had received no benefit. *Ruabon S. S. Co. v. London Assurance*, [1900] A. C. 6; KEENER, QUASI-CONT., 361.

There is more force in the argument that the advantage taken of the situation by the plaintiff should go in mitigation of damages. Cf. *Marine Ins. Co. v. China, etc., S. S. Co.*, 11 App. Cas. 573. Where a benefit accrues to the plaintiff as a proximate result of a tort, the damages are mitigated. *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171. If the own-

ers of the injured ship had definitely decided to dry dock her for their purposes, or if it were necessary so to do, then by the dry docking at the defendant's expense they have really been saved an expenditure which they otherwise would have incurred. The question then is whether such dry docking is the proximate result of the collision. If it is, then there should be a reduction, the damages being the expense of restoring the ship to its former condition. See 2 SEDG., DAM., 8th ed., § 592. No allowance is made for new materials put in place of old materials in the course of such repairs, nor for an increase in the value of the ship by reason of the repairs. *The Baltimore*, 8 Wall. (U. S.) 377, 385; *The Pactolus*, Swab. 173. Nor is there any reduction by reason of the fact that some of the repairs made would shortly have been necessary to enable the ship to pass her classification survey. *The Bernina*, 55 L. T. R. 781. In view of the reluctance of the courts to allow a reduction for benefits, as illustrated by the results reached in the decisions cited above, it may be doubted whether the dry docking would be considered a proximate result of the collision and the reduction allowed. But whichever view may be preferable, the result in the principal case is sound. It does not appear that the dry docking was necessary or had been definitely determined upon by the owners of the injured ship, and as it cannot be said that they were saved an expense which they would otherwise have incurred, no definite benefit can be pointed out.

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INSURABLE INTEREST. — Courts and text-writers have for many years said that the insured must possess an "insurable interest" in the subject-matter of an insurance policy but this term has rarely been precisely defined. See *Lucena v. Craufurd*, 2 Bos. & Pul. N. R. 269. It has frequently been held that the interest need be neither an equitable nor a legal right or liability. Cf. *Sun Ins. Office v. Mers*, 64 N. J. Law 301; *Boston Ins. Co. v. Globe Fire Ins. Co.*, 174 Mass. 229. A recent text-book states that "such an interest that pecuniary loss will result to the assured from the destruction of the property" is sufficient. MAY, INS., 4th ed., § 72, note. The vagueness of the term may proceed from confused ideas as to the purpose of the requirement. Although exact statements of this purpose are hardly to be found in the books, it seems to have been usually conceived either as the prevention of wagering policies or as the limitation of the amount recoverable to the damages suffered. It is believed, however, that neither the character of the insurance policy as a wager, nor the measure of damages depends upon the relation between the insured and the subject-matter of the policy.

At present, either by decision or by statute, wagers are illegal in probably all common law jurisdictions. Hence those insurance policies which are mere wagers are void. See *Loomis v. Eagle, etc., Co.*, 6 Gray (Mass.) 396; *Trenton, etc., Co. v. Johnson*, 24 N. J. Law 576. Although in wagering contracts, as in insurance contracts, performance by one party is conditioned on contingencies more or less beyond the control of either party, yet the wagerer hopes to gain from his contract, the insured only to make himself whole. The difference lies solely in the intentions of the parties. Furthermore, partly, perhaps, as an approximation of the real intentions of the parties, partly as a judicial invention, the rule has become firmly established that the insurance contract is one of indem-

nity only. From this rule it follows that the insured can in no case recover more than the actual damages that would have been sustained, had the contract not existed. It is to be noted that the prohibition against wagers invalidates the contract *ab initio*, while the rule that the insurance contract is one of indemnity assumes a valid contract and relates merely to the damages to be recovered. It may be that the statement, that an insurable interest is necessary to a valid policy, is but an abridged and inexact expression of the two rules stated. Possibly, however, the requirement creates a further limitation upon insurance contracts.

Insurance provides a means whereby losses of various kinds, otherwise borne primarily by individuals, are distributed among the community at large. If the chance that loss may come to an individual on the happening of a certain event be very remote, then, even although insurance against the possible loss be not a wager, and although there could be no recovery upon the contract by the insured unless loss occurred to him, yet public policy may demand that no such insurance contract be made. To require that the insured stand in a certain relation to the subject-matter of the contract is in effect limiting, in the direction just stated, the kinds of losses that may be insured against. It may well be thought that public policy does not require a limitation of this sort.

In a case lately decided in Colorado the doctrine of insurable interest was involved. One in possession of land but not claiming title, insured buildings thereon under a *bona fide* belief that he owned them. The court allowed recovery on the policy for an amount not stated. *American, etc., Co. v. Donlon*, 66 Pac. Rep. 249. As the insured did not intend to make a wager the policy was rightly held valid. *Cf. Marks v. Hamilton*, 7 Ex. 323; but see *Sweeny v. Franklin Fire Ins. Co.*, 20 Pa. St. 337. The measure of damages should have been the actual loss occasioned to the insured by the destruction of the buildings.

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ACCRUAL OF CAUSE OF ACTION FOR FAILURE OF SURFACE SUPPORT.—The question whether the owner of the surface of land acquires a right of action against the owner of the subjacent strata at the moment the latter removes the support, or only when the actual subsidence of the surface occurs, has not arisen often in America. In England it has come before the courts with some frequency, and it has there been decided by a unanimous opinion of the House of Lords that the Statute of Limitations begins to run not from the time of the excavating, but from that of the cave-in. *Backhouse v. Bonomi*, 9 H. L. Cas. 503. While few American cases raise the precise point many courts evidently regard the English doctrine as the settled rule. See *Smith v. Seattle*, 18 Wash. 484.

A discussion of this point in a recent Pennsylvania case consequently arouses interest when it appears that the court takes a directly contrary position and holds that the Statute runs from the date of the mining. *Noonan v. Pardee*, 50 Atl. Rep. 255. While acknowledging the final decision of *Backhouse v. Bonomi*, *supra*, the court regards it as being ill adapted to the conditions of coal mining in America. The court argues that since the plaintiff in the principal case knew that mines existed below his land, and since he had a right to investigate, and see that proper support had been left, his right of action arose when the mine

owner removed coal without leaving such support. To the argument that the plaintiff by careful observation might not have been able to discover the defendant's breach of duty, the court answers that that is "one of the incidents attending the purchase of land over coal mines." Later the court refers to the right of the surface owner to sue, as a "right which from the nature of the case could not have had more than a doubtful existence before the actual damage occurred" — an admission which seems to detract from the weight of the earlier reasoning.

The English rule regards the plaintiff's right as a right to the ordinary undisturbed enjoyment of the surface. The defendant's right on the other hand is to excavate the minerals from the subjacent strata, and so long as he acts without disturbing the plaintiff, he is within his rights. When the subsidence occurs, the plaintiff's enjoyment of the surface is interfered with, and his right of action accrues. In an apparently analogous class of cases where a railroad builds an embankment but negligently fails to put in proper drainage culverts and flood water is at times thrown on the plaintiff's land, the courts seem almost universally to have held that the Statute runs, not from the building of the embankment, but from the time of actual damage to the plaintiff. *St. Louis, etc., Co. v. Briggs*, 52 Ark. 240. On the whole then it would seem that the position of the principal case is hardly to be supported as against the reasonable and convenient rule of the English courts.

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**THE PAROL EVIDENCE RULE AS APPLIED TO INSURANCE POLICIES.** — The United States Supreme Court has handed down a decision that will have a far reaching effect upon the liability of insurance companies. The plaintiff brought action upon an insurance policy issued by an agent of the defendant. The policy contained conditions that it should be void if other insurance existed upon the property covered by its terms, and that no agent should have power to waive any condition of the policy unless such waiver were endorsed in writing upon the policy. The defence was that the property covered by the policy was in fact insured in another company at the time of the issuance of the policy. The plaintiff maintained that the defendant's agent, who had full powers to accept risks and issue policies, knew of the additional insurance when he issued the policy, and should be deemed to have waived the provision. The court, with three judges dissenting, held that the knowledge of the agent would not avoid the stipulation in the policy. *Assurance Co. v. Building Association*, 22 Sup. Ct. Rep. 133.

Although there is a conflict upon the point the great weight of authority is opposed to this decision. The reasoning of the principal case is that the insurance policy constitutes the contract of the parties, that by its terms the limitations of the agent's authority are brought home to the insured, and that to sustain the plaintiff's contention would be to vary a written contract, in violation of the parol evidence rule. As a matter of fact, however, a binding insurance contract is commonly made before the policy is issued. The agent of the insurer acting within the apparent scope of his authority agrees to assume the risk and issue the policy, and the insured agrees to pay for the policy when issued. The policy is merely the reduction into writing of a contract already existing, and if a loss occurs before the policy is issued the insurer is liable. *In*



*Insurance Co. v. Colt*, 20 Wall. 560. It follows then that limitations upon the agent's powers contained in the policy cannot affect a contract previously entered into by the insured without knowledge of such limitations. *Lightbody v. Insurance Co.*, 23 Wend. (N. Y.) 18. Moreover if the policy is merely a reduction into written form of a valid oral contract previously made by the agent of the insurer, any misdescription of the terms of that contract, whether occurring through the mistake or fraud of the agent, will be rectified by a court of equity, and the insured may then recover upon the policy as amended. *Barnes v. Insurance Co.*, 75 Ia. 11. Most of the courts however have gone further, and in cases like that under consideration have allowed the insured to recover in an action at law upon the policy, holding the insurer estopped to set up in defence the stipulation avoiding liability. *Robbins v. Insurance Co.*, 149 N. Y. 477. The theory upon which an estoppel is raised would seem to be that the insurer through its agent has represented to the insured that the policy embodies their oral contract, and the insured relying upon that representation has paid his premium. This view raises the question whether the insured is justified in relying upon such a representation, a question admitting of a difference of opinion. The numerous and complicated provisions of such policies, the inexperience of the insured with legal forms, and the general custom to lay aside such papers without careful perusal, present an argument in support of the doctrine. On the other hand the danger of abuse and fraud and the prevalence of statutory forms of policies would tend towards the stricter rule holding the insured to constructive knowledge of the contents of these documents, and compelling him to first seek their reformation if he desires to escape their provisions. While the latter view would support the conclusion of the court in the principal case it is unfortunately not suggested. The force of the reasoning is weakened by the failure to distinguish between the policy as the contract of insurance, and as evidence of that contract, and between the rights of the insured before and after knowledge of the limitations upon the powers of the insurer's agent has been brought home to him.

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THE MISSTATEMENT OF CONSIDERATION IN A DEED AS A BASIS FOR AN ACTION OF DECEIT. — At the present day the statement of consideration in a deed is not, so far as its accuracy is concerned, material. The fact that it is often, if not generally, grossly understated and that the public has learned to place no reliance on its truth has apparently led several courts into deciding that a false averment of consideration alone cannot give rise to an action of deceit. *Thorp v. Smith*, 51 Pac. Rep. 381 (Wash.); *Leonard v. Springer*, 34 Chic. Leg. News 121 (Ill.). In the latter case the defendant having only a lease of a building purported to convey the fee in consideration of \$100,000; and procured his grantee to execute a deed of trust to secure an issue of notes. The plaintiff declared that she had purchased one of the notes relying on the averment of the consideration and had been damaged in consequence. The defendant demurred; and the demurrer was sustained on the ground that the public is not intended to rely on such statements.

It is hard to see how the case can be sustained. The declaration avers that the defendant made a statement knowing it to be false, that the plaintiff relied on it and was thereby damaged, and that the defend-

ant intended the result. The defence that the false statement was of an immaterial fact should not be valid, for while the amount of the consideration in most conveyances is of no moment, yet when an investment of money on the security of the land conveyed is thereby induced, the statement becomes distinctly material. See *Belcher v. Costello*, 122 Mass. 189. Though it is in general true that no one relies on the statements of the price paid, yet here the plaintiff did rely on it: and there is little force in the assertion that because most people are not misled, therefore one who is misled shall be barred from redress. In every case it remains a question of fact whether or not the plaintiff was actually deceived. Nor is it a valid excuse that the plaintiff was negligent in not examining the title to the property for herself. The damage was intentionally inflicted, and contributory negligence is no defence to an intentional tort. *Cottrill v. Krum*, 100 Mo. 397. In apparent contradiction are the many cases of "seller's talk." But it is conceived that these are to be distinguished as cases in which the plaintiff did not in fact rely and was not intended to rely on the statements made. One ground adopted in the principal case was that no representation was made by the defendant to the plaintiff. The law seems settled however, that if a representation be made to a class, or with intent to deceive a class, of which the plaintiff is one, no direct personal communication is necessary. *Bedford v. Bagshaw*, 4 H. & N. 538. It seems, upon analysis, that the decisions similar to that of the principal case are based upon remoteness. The injury is considered as not a natural and probable result of the defendant's act. Undoubtedly this argument appears sound to all who are familiar with the absolute meaninglessness of statements of consideration in conveyances. But here the statements were inserted purely to deceive. The result was intended; and the principle that an improbable consequence, if intended and desired has the same legal effect as though it had been the natural and probable one, is eminently applicable. See JAGGARD, TORTS, 382; POLLOCK, TORTS, 2d ed., 28.

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MEASURE OF DAMAGES FOR INTERRUPTION OF A WATER RIGHT. — A case recently decided in Wisconsin, gives rise to some interesting considerations in the law of damages. The plaintiff was entitled to the use of the water power at a dam and the defendant appropriated it during a considerable period. Though the plaintiff suffered no actual damage he was allowed to recover, in an action of tort, the fair market value of the water during the period that the defendant had used it. *Green Bay, etc., Canal Co. v. Kaukaunee Water Power Co.*, 87 N. W. Rep. 864.

At first sight it would seem that the plaintiff should recover, in a tort action for the interruption of an incorporeal right, only for the damage he has suffered; that is, a nominal amount to establish his right, but no more unless he has sustained actual loss. In awarding damages, however, the generally acknowledged purpose is compensation, that is to restore to the plaintiff an equivalent for being deprived of some right. See SEDG., DAM., 8th ed., § 29 *et seq.* In whatever form the action be brought, it is believed this principle will apply. So in contract and trover the plaintiff is compensated for the right to certain property which the defendant has kept or taken from him, in personal actions of tort it is for the right to good health or reputation. In actions for interference with real pro-

perty, whether the plaintiff has had property injured or has been merely kept from the enjoyment of that to which he was entitled, in these, as in other cases, he should recover for the right of which he has been deprived.

The question thus becomes, how shall the value of the right, for which compensation must be made, be estimated? It seems general law that the plaintiff should recover for the fair value of that right, irrespective of whether or no he desired to exercise it. On the one hand he cannot recover an extra amount because of any peculiar value he attached to the right in question. *Moseley v. Anderson*, 40 Miss. 49. On the other he is not deprived of compensation to its full value because he was not about to make full use of it. *Patterson v. Mississippi Boom Co.*, 98 U. S. 403. The defendant cannot mitigate his liability to pay for the value of the right of which he has deprived the plaintiff by showing that owing to the plaintiff's peculiar situation the actual effect upon him was small. See *Elmer v. Fessenden*, 154 Mass. 427. *Storrs v. Los Angeles Traction Co.*, 66 Pac. Rep. 72 (Cal.). This principle would seem to apply to all classes of cases. See SEDG., DAM., 8th ed., § 2431. Thus in an action for the wrongful uses of a way, damages were assessed, not by the mere actual injury done to the land, but at what would be a reasonable rent for a license; in other words the fair value of the right. *Jegon v. Vivian*, L. R. 6 Ch. App. 742. So in the principal case it seems just that the defendant should pay for the water he has appropriated. The plaintiff was entitled to its flowage, his right was taken away from him, and according to the general rule the fact that he did not care to use the right in no way affects the determination of its value. Moreover if the defendant had to pay nominal damages only, he would be in a better position as a trespasser than if he had rightfully leased the water right. See *De Camp v. Bullard*, 159 N. Y. 450. The real injury then, which the plaintiff has suffered is the loss of a right, and his true measure of damages is not merely what that loss has happened to cost him, but its fair market value.

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## RECENT CASES.

**BANKRUPTCY—GENERAL ASSIGNMENT—ALLOWANCE FOR SERVICES OF ASSIGNEE.**—*Held*, that an assignee under a general assignment, which was later taken advantage of as an act of bankruptcy, is not entitled to compensation for services rendered prior to the filing of the petition in bankruptcy. *Wilbur v. Watson*, 111 Fed. Rep. 493 (Dist. Ct., R. I.).

Under the present Act, general assignments are valid unless followed by bankruptcy proceedings. *In re Romanow*, 92 Fed. Rep. 510; *In re Sievers*, 91 Fed. Rep. 366. The trustee in bankruptcy, however, may avoid the assignment and recover the property. *Davis v. Bohle*, 92 Fed. Rep. 325. Although not specifically provided for, this result is correct, being clearly within the spirit of the statute. See 13 HARV. L. REV. 147. The result is reached by treating general assignments as within § 67 *e*, calling them "constructively fraudulent," being "frauds upon the Bankruptcy Act." *In re Gutwillig*, 92 Fed. Rep. 337; *Matter of Gray*, 47 N. Y. App. Div. 554. Since they are not wrongful *ab initio*, and not actually fraudulent, this would seem an unfortunate use of language, which has apparently led the court in the principal case to regard the assignee as a wrongdoer; the allowance being refused because the assignee is regarded as an actor in a fraudulent transaction. The assignee is not one of the creditors of the bankrupt, but since the estate may have received benefit from the assignee's services, the amount of that benefit might well be granted. This was done in *In re Scholtz*,



106 Fed. Rep. 834; *cf. In re Paul Book Co.*, 104 Fed. Rep. 786. Such benefit being rare and its amount generally problematical, the principal decision may perhaps be supported on grounds of expediency. There seems to be very little authority on the question.

**BILLS AND NOTES — NOTE FILLED IN FOR UNAUTHORIZED AMOUNT — CONSTRUCTION OF "NEGOTIATED" IN BILLS OF EXCHANGE ACT.** — The defendant signed a blank form and gave it to A with authority to fill it up as a promissory note for £15. A made the note for £30 payable to the plaintiff, who purchased it in good faith without notice that it had been signed in blank. The Bills of Exchange Act of 1882, § 20, provides that such a note is not enforceable against the maker unless "negotiated to a holder in due course." *Held*, that the plaintiff cannot recover since a note is not "negotiated" by delivery to the payee. *Herdman v. Wheeler*, 18 T. L. R. 190 (K. B.).

Apart from statute, one who signs and delivers a note with the amount left in blank, is liable to a purchaser for value without notice for the sum inserted, though greater than that authorized. *Garrard v. Lewis*, 10 Q. B. D. 30; *Bank of Pittsburgh v. Neal*, 22 How. 96. The payee may be such a *bona fide* holder just as in all analogous cases where equities exist between the maker and the intermediary. *Fullerton v. Sturges*, 4 Oh. St. 530; *cf. Watson v. Russell*, 3 B. & S. 34; see 11 HARV. L. REV. 473. The construction given the word "negotiated," therefore, works a decided change in the law. The definition of "negotiated" in § 31 lends some color to this interpretation, and there is a *dictum* in accord. *Lewis v. Clay*, 67 L. J. Q. B. (n. s.) 224. Even if technically correct this construction seems too narrow to support such an unfortunate result. The payee in the principal case is substantially in the position of a *bona fide* transferee and should have all the latter's rights. If the same construction were applied to § 29, it would seem that a payee could not be a holder in due course, since by implication such holder must receive the instrument by "negotiation." The court's attempt to avoid this difficulty is not satisfactory. If the construction given is necessary, this case brings out a flaw in the English Act, and in the similar provisions of our own law.

**CONFLICT OF LAWS — CARRIERS' CONTRACTS — PUBLIC POLICY.** — A steamer ticket containing stipulations exempting the carrier from liability for losses occasioned by negligence, was bought in Belgium where such stipulations were valid. *Held*, that the stipulations are unreasonable, and void as against public policy. *The Kensington*, 22 Sup. Ct. Rep. 102.

In the federal courts and in the majority of the state courts, stipulations on a ticket exempting a carrier from responsibility for negligence are invalid; but in England and on the continent such exemptions are allowed. *New York Central R. R. Co. v. Lockwood*, 17 Wall. 357; *Carr v. Lancashire, etc., Ry. Co.*, 7 Ex. 707. Cases of transatlantic carriage, therefore, frequently raise the question whether contracts of this sort which are valid where made, will be upheld, when they would be void if made in the jurisdiction where enforcement is sought. In previous cases, the United States Supreme Court has expressly left the question open. *Liverpool, etc., S. S. Co. v. Phoenix Ins. Co.*, 129 U. S. 397. Several state courts, however, have given an affirmative answer. *O'Regan v. Cunard S. S. Co.*, 160 Mass. 356. The lower federal courts, on the other hand, have almost unanimously adopted the view that is now taken in the principal case. *The Glenmavis*, 69 Fed. Rep. 472; see *The New England*, 110 Fed. Rep. 415. The decision of the Supreme Court may be supported upon principle also. Since foreign law is enforced in any case only because the local sovereign is willing, for that case, to accept it as his municipal law, an exception may properly be made in cases where the foreign law conflicts with the public policy of the state in which the cause is heard. See STORY, CONFL. LAWS, §§ 38, 244.

**CONFLICT OF LAWS — EQUITY — ENJOINING TRESPASS IN A FOREIGN JURISDICTION.** — *Held*, that equity does not have jurisdiction to enjoin trespass to real estate in a foreign territory, though the parties are before the court. *Lindsley v. Union, etc., Co.*, 66 Pac. Rep. 382 (Wash.).

Equity, acting *in personam*, frequently enjoins the commission of an act outside the jurisdiction, where the necessary parties are before the court. *Cunningham v. Butler*, 142 Mass. 47. The principal case, however, is based on the analogy of an almost universal rule of law, that an action will not lie for injuries to foreign real estate. *British, etc., Co. v. Companhia de Moçambique*, [1893] A. C. 602; *contra, Little v. Chicago, etc.,*

*Ry Co.*, 65 Minn. 48. Having its origin in a distinction between local and transitory actions depending upon venue, as a rule of territorial jurisdiction it seems purely arbitrary. See *Whitaker v. Forbes*, 1 C. P. D. 51. Indeed there seems to be no satisfactory reason to support it. See *Livingston v. Jefferson*, 1 Brock. (U. S. Circ. Ct.) 203. There is some authority, with which the principal case is in accord, for applying in equity the rule above stated, on the ground that equity follows the law. *Northern Ind. R. R. Co. v. Michigan Central R. R. Co.*, 15 How. 233. There seems, however, to be as much authority the other way. *Alexander v. Tolleston Club*, 110 Ill. 65; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462. Since the unfortunate result is reached that the plaintiff is greatly hindered in obtaining adequate remedy, it would seem wiser to disregard the common law rule, to which equity is not generally committed, and to grant the relief which equity has power to give.

CONSTITUTIONAL LAW — CARRIERS — INTERSTATE COMMERCE — LONG AND SHORT HAUL LEGISLATION BY A STATE. — A state constitutional provision forbids a carrier charging more for a short haul than for a long haul within which the short one is included. *Held*, that in cases where the long haul is an interstate haul, and the enforcement of the provision would compel the carrier to raise his rate for that haul, the provision is an interference with interstate commerce and not enforceable. *Louisville & Nashville R. R. v. Eubank*, U. S. Sup. Ct., decided Jan. 27, 1902. See NOTES, p. 570.

*Held*, that in cases where both hauls are within the state limits, the provision is not in conflict with the federal constitution. *Louisville & Nashville R. R. v. Kentucky*, 22 Sup. Ct. Rep. 95. See NOTES, p. 570.

CONSTITUTIONAL LAW — FOREIGN INSURANCE COMPANIES — REGULATION BY STATE STATUTES. — Mass. St. 1894, c. 522, § 98, imposes a fine upon any person acting "in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business within the Commonwealth." The defendant was employed as agent in Massachusetts by the owner of Massachusetts property to negotiate insurance thereon outside the state. *Held*, that the statute, as interpreted to cover the defendant's case, is constitutional. *Nutting v. Massachusetts*, 22 Sup. Ct. Rep. 238.

The court regards this statute as a legitimate exercise of the state's power to regulate and even to prohibit the transaction of business by foreign insurance companies within its limits. *Hooper v. California*, 155 U. S. 648. It has been held, however, that this power does not enable the state to forbid contracts of insurance for property within its limits when the contracts are made outside. *Allgeyer v. Louisiana*, 165 U. S. 578. Such a statute was regarded as violating one of the rights secured by the Fourteenth Amendment, the term "liberty" being interpreted vaguely to include an almost unlimited right to contract. *Cf. Butchers' Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 762. Passing over this doubtful construction, which has been widely adopted, it would nevertheless seem that the legitimate power of a state to protect its citizens against possible insurance frauds, is sufficient to supply the requisite of "due process" in cases like *Allgeyer v. Louisiana*, *supra*. *Commonwealth v. Nutting*, 175 Mass. 154. It is to be hoped that the decision in the principal case, which sustains the application of the statute to a case in which a very small part of the transaction took place in Massachusetts, marks a tendency to limit as far as possible the effect of *Allgeyer v. Louisiana*.

CONTRACTS — RESTRAINT OF TRADE — LIMITATION AS TO SPACE. — The vendor of a manufacturing business covenanted not to engage in the same business within the state during a term of years. *Held*, that the contract is void. *Union Strawboard Co. v. Bonfield*, 61 N. E. Rep. 1038 (Ill., Sup. Ct.).

The principal case defines the position of Illinois upon a growing topic in the law, by establishing as decision what had already been indicated by way of *dictum*. See *Lansit v. Sefton Mfg. Co.*, 184 Ill. 326; and see also *Lufkin Rule Co. v. Fringeli*, 57 Oh. St. 596. The rule thus laid down, forbidding restrictions that apply throughout the jurisdiction, was once law in England, and also prevailed widely in this country. *Mitchell v. Reynolds*, 1 P. Wms. 181; *Taylor v. Blanchard*, 13 Allen (Mass.) 370. The present English doctrine, which considers restrictions as to space of importance only in their bearing upon the general question of reasonableness, was established by the decision in *Nordenfelt v. Maxim Nordenfelt, etc., Co.*, [1894] A. C. 535. Accordingly, restrictions covering the whole of England have been enforced. *Underwood v.*

*Barker*, [1899] 1 Ch. 300. Some American courts accept the English doctrine. *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484. Others have extended the old rule so far as to make the United States, rather than the state, the maximum area over which the restriction may extend. *Diamond Match Co. v. Roeber*, 106 N. Y. 473; but see *Tode v. Gross*, 127 N. Y. 480; and see also *Beal v. Chase*, 31 Mich. 490. Arbitrary limitations as to space would, however, seem logically to apply only within the jurisdiction of the court imposing them. The English view seems on principle the sound one, and towards it the American decisions seem generally to be tending. See 4 HARV. L. REV. 128; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101.

**CORPORATIONS — ESTOPPEL BY ACTS OF SHAREHOLDERS.** — Several persons who, as assignors of a patent, were estopped to dispute its validity, formed a corporation of which they were the sole shareholders. This corporation was sued by the assignees of the patent for an infringement. *Held*, that the corporation is bound by the estoppel. *Force v. Sawyer-Boss Mfg. Co.*, 111 Fed. Rep. 902 (Circ. Ct., E. D. N. Y.).

It would seem that when several persons, merely for convenience in conducting their business, form a corporation which they immediately control and intend to continue to control, and all the stock is owned by them or by others not innocent holders, the corporation ought to be bound by any estoppel, notice, or specifically enforceable negative contract by which its members were previously bound. *National Conduit Co. v. Connecticut Pipe Co.*, 73 Fed. Rep. 491; *Davis Co. v. Davis Co.*, 20 Fed. Rep. 699; *Beal v. Chase*, 31 Mich. 490. A rule at least as broad as this is necessary to prevent such persons from escaping their obligations under the thin disguise of incorporation. It has been held, however, that the principle of the above cases extends only to corporations formed for the purpose of escaping the restraint in question. *Moore & Handley Co. v. Towers Co.*, 87 Ala. 206. This restriction is not borne out by the cases as a whole and, while apparently resting solely on assumed expediency, would work injustice. The principal case therefore seems correct, although no fraudulent intent clearly appears. A much more comprehensive rule than that above is laid down by one text writer, but the authorities cited are not sufficient to sustain it in full. See 4 THOMPS., CORPS., §§ 5249, 5269.

**DAMAGES — APPROPRIATION OF WATER POWER.** — The plaintiff was entitled to the use of a water power, which the defendant had appropriated. The plaintiff had not desired to use the power and so had suffered no actual damage. *Held*, that the plaintiff's measure of recovery in tort is the fair rental value of the use of the water during the period it was taken. *Green Bay, etc., Water Co. v. Kaukauna Water Power Co.*, 87 N. W. Rep. 871 (Wis.). See NOTES, p. 577.

**DAMAGES — BENEFITS — MITIGATION.** — The owners of a ship had her bilge keel fitted while she was in dry dock for other repairs, for the expense of which the defendant was liable. The additional work did not cause any increase in the dock charges. *Held*, that the defendant is liable for the entire dock charges. *The Acanthus*, 112 L. T. 153 (P.). See NOTES, p. 572.

**DECEIT — FALSE STATEMENT OF CONSIDERATION IN A CONVEYANCE.** — The plaintiff declared that she had bought certain notes secured by property deeded to a trust company; that the consideration stated in the conveyance was grossly misrepresented by the defendant for the purpose of cheating and defrauding the plaintiff and others; that she had relied on the statement in buying the notes, and that the notes were worthless. The defendant demurred. *Held*, that the plaintiff has not stated a cause of action. *Leonard v. Springer*, 34 Chic. Leg. News 121 (Ill., App. Ct.). See NOTES, p. 576.

**EQUITY — BILL FOR RESCISSION. — INADEQUACY OF LEGAL REMEDY.** — The grantor conveyed her farm to her nephew, who in return covenanted that he would live with her on the farm and support her during the rest of her life. After performing for a few months, the nephew left the farm, and refused to carry out his covenant further. *Held*, that the grantor may have a decree declaring the deed null and void and placing the parties *in statu quo*. *Lowman v. Crawford*, 40 S. E. Rep. 17 (Va.).

As the performance of the covenants involved elements of personal care and attention to the grantor, as well as her continued residence in her old home, the legal remedy was in no wise adequate. Moreover, the whole purpose of the transaction had failed, and it would seem to be a proper place for equity to act. Accordingly under

like circumstances the trend of authority in this country is with the case. *Savannah, etc., Ry. Co. v. Atkinson*, 94 Ga. 780; *Cooper v. Gum*, 152 Ill. 471. Exactly the same point seems never to have come before the English courts. But, owing to their literal enforcement of the rule requiring restitution *in specie* in all cases of rescission, it seems likely that they would reach an opposite result. Cf. *Hunt v. Silk*, 5 East 449. The principal case seems to show a decided advantage in the more liberal construction of this rule by the American courts. Cf. *Brewster v. Wooster*, 131 N. Y. 473. The form of the decree, however, appears to be wrong. The deed vested the title in the grantee and, in absence of statute, it cannot be revested in the grantor except by a reconveyance. Cf. *Hart v. Sanson*, 110 U. S. 151. Compensation should of course be made to the grantee for services actually rendered.

**EQUITY—LIQUIDATED DAMAGES—RELIEF ADDITIONAL TO INJUNCTION.**—A contract of employment bound the defendant not to compete in business with the plaintiffs, within certain limits, after leaving their service, and named £100 as liquidated damages in case of breach. The defendant did compete, and the plaintiffs sued for an injunction and for the liquidated damages. *Held*, that the plaintiffs may elect either of these remedies, but cannot have both. *General Accident Assurance Corp. (Limited) v. Noel*, 18 T. L. R. 164 (K. B.).

Apparently the contract was interpreted to mean that the plaintiffs might, in case of a breach, compel either specific performance or payment of the liquidated sum, at their option; a payment, of course, operating to release the defendant from further obligation. *Sainter v. Ferguson*, 1 Mac. & G. 286. This would not be the usual alternative contract, where the option lies with the defendant, but such a construction seems necessary to support the case. If, on the other hand, the contract merely attempts to liquidate the damages, without giving an option on either side, the plaintiffs should recover only the amount of the damage actually sustained. To give the full sum after an apparently slight breach, would be enforcing a penalty and open to objection on that ground. *Lampman v. Cochran*, 19 Barb. (N. Y.) 388; *Kemble v. Farren*, 6 Bing. 141. The existence of the agreement for liquidated damages is no obstacle to granting an injunction. *Jones v. Heavens*, 4 Ch. D. 636; *Ropes v. Upton*, 125 Mass. 258. It follows that the agreement would not bar the compensation for past damage usually given with such an injunction. Under either construction of the contract, the injunction should carry with it this compensation as additional relief.

**EVIDENCE—CRIMINAL CONVERSATION—STATEMENTS MADE BY PLAINTIFF'S WIFE TO THIRD PERSONS.**—*Held*, that in an action for criminal conversation, brought by a husband, oral statements made by the wife to third persons in the absence of both the plaintiff and the defendant, indicating the state of the wife's feelings toward the husband, are not admissible. *Billings v. Albright*, 66 N. Y. App. Div. 239.

The relations between the husband and the wife before and, according to some authorities, after the defendant's interference are to be considered by the jury in determining the amount of damages. *Harter v. Crill*, 33 Barb. (N. Y.) 283; *Prettyman v. Williamson*, 1 Pen. (Del.) 224. The feeling of the wife toward the husband is therefore directly in issue. The mental condition of a person at any particular time may be proved by his declarations made at that time. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285. The court in the principal case recognizes this rule by admitting the statements of the wife to the husband to prove her feeling toward him; and no good reason appears for distinguishing her declarations to third persons. The court excludes them on the ground of the danger of collusion. This danger is equally present in admitting statements made to the husband, and in case of declarations prior to the misconduct, is not serious. The weight of authority is in favor of admitting such declarations. *Palmer v. Crook*, 73 Mass. 418. The tendency is to exclude statements after the act, though if the subsequent relation between husband and wife is in issue, they are admissible in theory and should be received on proof of good faith.

**INSURANCE—EVIDENCE—PAROL EVIDENCE RULE APPLIED TO INSURANCE POLICY.**—An insurance policy contained a provision that the insurer should not be liable if other insurance existed upon the property covered by the policy. *Held*, in an action upon the policy, that this provision cannot be avoided by evidence that the agent of the insurer who issued the policy, knew of the existence of other insurance at the time of its issuance. *Northern Assurance Co. v. Grand View Bldg. Assoc.*, 22 Sup. Ct. Rep. 133. See NOTES, p. 575.



**INSURANCE — INSURABLE INTEREST — POSSESSION.** — One in possession of land, but not claiming title, insured buildings thereon under a *bona fide* belief that he owned the buildings. *Held*, that he may recover on the policy. *American, etc., Co. v. Donlan*, 66 Pac. Rep. 249 (Col., C. A.). See NOTES, p. 573.

**INSURANCE — MISSTATEMENTS IN APPLICATION — BLANKS FILLED BY AGENT.** — An agent, appointed to solicit insurance, forwarded to his company an application for an accident insurance policy, purporting to contain the answers of the applicant to the questions contained therein. It was in fact filled out by the agent, and the applicant signed it without reading it. Some of the answers were untrue in material respects, owing to the fraud or gross negligence of the agent. Upon the basis of this application a policy was issued. *Held*, that no recovery can be had on the policy. *Biggar v. Rock, etc., Co.*, 18 T. L. R. 119 (K. B.).

Despite the misrepresentations, the company should be bound if it is affected with the knowledge of the agent. See NOTES, p. 575. This would be true if he had a share in the making of the contract, or if it was one of the duties of his employment to report upon matters connected with the application. See *Smith v. Farmers', etc., Co.*, 89 Pa. St. 287; 15 HARV. L. REV. 489. But such agents by general custom have very limited authority. See *McCoy v. Metropolitan, etc., Co.*, 133 Mass. 82. Accordingly knowledge on their part has been held immaterial. *Ryan v. World, etc., Co.*, 41 Conn. 168. Such a view seems correct in the principal case, where apparently the agent's duty was merely to solicit and forward applications; so it is enough to defeat the policy that it was issued on the basis of representations materially untrue. *Vose v. Eagle, etc., Co.*, 6 Cush. (Mass.) 42. The court reaches the same result by considering the agent as the plaintiff's agent in making out the application. This view, though not generally accepted, is supported by some authority. *Wilson v. Conway, etc., Co.*, 4 R. I. 141; but *cf. Jordan v. State Ins. Co.*, 64 Ia. 216. It is also defensible on theory, as an agent may act for two parties where his duties do not require him to perform incompatible acts. *Hinckley v. Arey*, 27 Me. 362. The decision, thus supportable on two grounds, is nevertheless against the weight of authority. See *Rockford Ins. Co. v. Nelson*, 75 Ill. 548; but *cf. New York, etc., Co. v. Fletcher*, 117 U. S. 519. The plaintiff should, in any case, recover the premiums paid. *New York, etc., Co. v. Fletcher, supra*.

**MORTGAGES — ASSIGNEE ASSUMING MORTGAGE DEBT — PAYMENT BY MORTGAGOR.** — The plaintiff, having mortgaged his land, made a conveyance to the defendant, who promised to pay the mortgage. The plaintiff paid the mortgage debt after maturity, and had the mortgage discharged of record. He then sued the defendant for the amount paid. *Held*, that the court should not have directed a verdict for the plaintiff. *Keller v. Lee*, 66 N. Y. App. Div. 184.

The court, to support its opinion, cites various New York cases which say that the land is the primary fund for the debt, and that the purchaser's contract is only to indemnify the mortgagor in case the land does not satisfy the debt, and the mortgagor is obliged to pay. On this ground specific performance of the purchaser's promise has been refused. *Slauson v. Watkins*, 86 N. Y. 597. Yet the original mortgagor was under a personal obligation to the mortgagee. *Cf. Jackson v. Bevins*, 49 Atl. Rep. 899 (Conn.). This the mortgagee has never released, nor has he bound himself first to seek satisfaction from the land. Moreover a mortgagee has been allowed to recover on a purchaser's promise without foreclosure. *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Beeson v. Green*, 103 Ia. 406. Further, recovery by the mortgagor against the purchaser has been allowed even before the former has paid. *Baldwin v. Emery*, 89 Me. 496. These cases show that the purchaser is under a personal obligation for the whole debt. As between themselves the mortgagor is in the position of a surety for the purchaser. *Murray v. Marshall*, 94 N. Y. 611. The plaintiff's payment of an obligation on which he was personally liable, as in the case of an ordinary surety, cannot be regarded as voluntary. *Cf. Pitt v. Purssord*, 8 M. & W. 538. The mortgagor should therefore get indemnity; and this has generally been allowed when he has had to pay. *Bolles v. Beach*, 22 N. J. Law 680; *Lappen v. Gill*, 129 Mass. 349.

**MUNICIPAL CORPORATIONS — LIMITATION OF INDEBTEDNESS — OBLIGATION ENFORCEABLE UP TO LIMIT.** — The defendant school district contracted to buy from the plaintiff the material for a building, thereby increasing its indebtedness beyond the constitutional limit. *Held*, that the plaintiff, after completion of the building, can

recover on the contract that amount for which the district could legally have become indebted. *McGillivray v. Joint School Dist.*, 88 N. W. Rep. 310 (Wis.).

The general rule is well established that a municipal corporation, having incurred an obligation which increases its indebtedness beyond the constitutional limit, is liable up to such limit. *Francis v. Howard County*, 50 Fed. Rep. 44. The weight of authority is in accord with the principal case in applying the rule even to indivisible contracts, when fully performed by the other party. *Culbertson v. City of Fulton*, 127 Ill. 30; *School Town of Winamac v. Hess*, 151 Ind. 229. Some authorities, however, under such circumstances distinguish divisible and indivisible contracts and hold the latter wholly void. See *Hedges v. Dixon County*, 150 U. S. 182; *Board, etc., of Lake County v. Standley*, 24 Col. 1. The distinction does not seem justified. It is the incurring of the indebtedness which is prohibited by the constitution, and the contract or bonds are valid, though unenforceable as to the excess. The defence is that of legal impossibility, and should be good only as to the part made impossible. The indivisibility of the contract is then immaterial and should not affect the obligee's right. The result is peculiarly just in the principal case, since it is free from the difficulty present in the common case of an issue of bonds, in which the loss must be divided among different obligees.

**MUNICIPAL CORPORATIONS — POLICE POWER — ALIGHTING FROM MOVING TRAINS.** — Under a charter giving power to pass all necessary police ordinances, the city of Chicago passed an ordinance making it illegal for persons to get on or off moving trains without permission of those in charge. *Held*, that the ordinance is invalid as not being a necessary police regulation. *Wise v. Chicago & N. W. Ry. Co.*, 61 N. E. Rep. 1084 (Ill., Sup. Ct.).

As the court very properly considers "necessary police ordinances" to mean police ordinances reasonably conducive to the morals, safety, and good order of the general public, the question reduces itself to whether the matter regulated here falls within the police power. The courts of Illinois have always taken a narrow view as to the scope of this power. *Toledo Ry. Co. v. Jacksonville*, 67 Ill. 37; *Ritchie v. People*, 155 Ill. 98. In the present case, however, the court would seem to be following a well defined public sentiment. Courts have a prejudice, common in all American communities, against interference with personal liberty in matters of this character, by legislation which they consider as designed primarily to protect the individual against himself without sufficient public end. So in the only case found dealing with an ordinance closely similar to that in the principal case, the same view was taken. *Mills v. Missouri, etc., Ry. Co.*, 59 S. W. Rep. 874 (Tex.); *cf. Ex parte Smith*, 135 Mo. 223. Considered more broadly, however, such laws may fairly be treated as within the power to guard the safety of the community. *Cf. Ah Lim v. Territory of Washington*, 1 Wash. St. 156; *Birkett v. Chatterton*, 13 R. I. 299. The decisions on the validity of the eight-hour laws would seem to be in point. See 12 HARV. L. REV. 61; 13 *Ibid.* 222.

**PERSONS — INFANTS — LIABILITY IN TORT.** — The defendant, an infant, contracted to thresh grain stored in a building upon the plaintiff's land. Owing to the defendant's negligence in the conduct of the work, the grain and the building containing it were destroyed by fire. *Held*, that the defendant is not liable in an action of tort. *Lowery v. Cate*, 64 S. W. Rep. 1068 (Tenn.).

The general rule that an infant is liable for his torts, is subject to the rather indefinite qualification, that when the tort arises in connection with a contract, he is commonly held not liable. See *Schenk v. Strong*, 4 N. J. Law 87. In certain cases, however, of fraud and wilful wrongdoing this qualification is more or less generally held to be inapplicable. See 14 HARV. L. REV. 71; *Burnard v. Haggis*, 14 C. B. N. S. 45; but *cf. Penrose v. Curren*, 3 Rawle (Pa.) 351. But in actions based on negligence involved in acts performed under the contract, the infant is held not liable, on the ground that such actions are virtual evasions of his right to avoid his contracts. See *Jennings v. Rundall*, 8 T. R. 335. This reason is applicable only when the damage suffered would be recoverable in contract against an adult. Assuming that to be true in the principal case, it may still be distinguished as being the only case found where there was injury to property not concerned in the contract, and courts might well go so far as to allow recovery under such circumstances. No decisions can be cited sustaining this distinction, but it accords with the tendency shown by some courts to restrict the infant's immunity from the consequences of his wrongful acts. See *Kilgore v. A~dan*, 17 Tex. 341; *Rice v. Boyer*, 108 Ind. 472.

**PERSONS—INFANTS' CONTRACTS—AVOIDANCE DURING MINORITY.**—A minor, having been injured by the fault of a railway company, accepted a sum of money in full discharge of the company's liability. While still an infant she sued in tort, asserting her disaffirmance of the contract of compromise. *Held*, that she cannot avoid the contract while within age. *Lansing v. Michigan Cent. Ry. Co.*, 86 N. W. Rep. 147 (Mich.).

Earlier authorities in the same state have gone as far as this case goes. *Dunton v. Brown*, 31 Mich. 182. Elsewhere it is well settled that an infant may avoid his contracts while within age. *Stafford v. Roof*, 9 Cow. (N. Y.) 626. On the other hand it is universally held that an infant may not conclusively avoid his conveyances of land until he is of age. *Zouch v. Parsons*, 3 Burr. 1794. But this inconsistency is only an apparent one, since the infant may enter and take profits during his minority, exercising his election when reaching full age. *Bool v. Mix*, 17 Wend. (N. Y.) 119. The principal case goes on the ground that the want of discretion that prevents an infant from making a binding contract should also prevent him from disaffirming one that may be beneficial to him. But the loss that he may often suffer by being held to disadvantageous contracts until of age, would seem a weightier consideration than the danger of losing benefits by unwise disaffirmance. The rule in the principal case seems never to have been carried to the length of allowing judgment to go against an infant in suit on the contract, and it is doubtful if any court would carry it so far.

**PROPERTY—BAILMENTS—ACTION BY BAILEE AGAINST THIRD PERSON.**—Property in the hands of a bailee was destroyed by the negligence of a third person. *Held*, that the bailee is entitled to recover the value of the property, though before such recovery he would have a good answer to an action by the bailor. *The Winkfield*, 18 T. L. R. 178 (Eng., C. A.).

The decision in the principal case is in accord with American authority and with the early cases in England. *Ullman v. Barnard*, 7 Gray (Mass.) 554; *Burton v. Hughes*, 2 Bing. 173; *Swire v. Leach*, 18 C. B. N. S. 479. Furthermore it would seem to be sound historically. See HOLMES, COMMON LAW, ch. 5. Originally the bailee alone could sue the wrongdoer, since he alone had possession; though after recovery he was liable to account to his bailor. At a later day the bailor was allowed to recover against the wrongdoer, provided he brought suit before the bailee. Then, by a curious inversion of reasoning, it came in time to be held that a bailee could not recover the value of the property in a suit against the wrongdoer, unless, even without such recovery, the bailee would himself be liable in an action by his bailor. *Heydon and Smith's Case*, 13 Co. 67, 70. This inverted reasoning was the *ratio decidendi* in the leading English case, which was thought to have fixed the law to the effect that a bailee could recover only the damage to his own interest. *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422. See 6 HARV. L. REV. 156. By expressly overruling that decision, the Court of Appeal in the principal case has restored the orthodox doctrine on this point.

**PROPERTY—SALE BY TENANT IN COMMON—TROVER AGAINST PURCHASER.**—A tenant in common of land, without the consent of his co-tenant, gave the defendant a license to cut timber on the land and take it for his own exclusive use. The defendant did so. *Held*, that the injured co-tenant may recover for conversion. *Sullivan v. Sherry*, 87 N. W. Rep. 471 (Wis.).

The general American rule is that a tenant in common of personalty who sells the entire property without authority, is liable in trover to his co-tenant. *Weld v. Oliver*, 21 Pick. (Mass.) 559. Several courts, while adopting this rule, have protected the purchaser on the ground that the sale passed only the moiety of his vendor, making him merely a co-tenant with the plaintiff. *Dain v. Cowing*, 22 Me. 347. See *Osborn v. Schenck*, 83 N. Y. 201. This doctrine has been applied to divisible as well as indivisible chattels. *Kilgore v. Wood*, 56 Me. 150. The proposition, however, that such a conveyance, not in market overt, may be tortious on the side of the grantor, but innocent on that of the grantee, seems indefensible; and in general, exclusion under a claim of title from a wrongful grantor is sufficient to support trover. *Hollins v. Fowler*, L. R. 7 H. L. 757. The fact that the defendant in the principal case claims, not under an ordinary sale of chattels, but under a license to cut and remove timber, seems not to affect the principles applicable. The decision accords with the generally recognized principle of *Hollins v. Fowler*, *supra*, and is supported by one parallel case. *Van Doren v. Balty*, 11 Hun (N. Y.) 239.

**PROPERTY—STATUTE OF LIMITATIONS—RIGHT TO SUPPORT OF LAND.**—The defendant made excavations in his coal mines beneath the plaintiff's land, and thereby caused the surface to cave in. *Held*, that the plaintiff's right of action accrued, not at the time of subsidence, but at the time of mining. *Noonan v. Pardee*, 50 Atl. Rep. 255 (Pa.). See NOTES, p. 574.

**PROPERTY—TRANSFER OF TITLE AFTER JUDICIAL SALE—RELATION.**—The interest of the assignee of a lease was sold under a judicial decree, but no deed was given to the purchaser. Later the assignee was sued for rent due since the sale, upon the covenant in the lease. After the beginning of the action a deed was given to the purchaser. *Held*, that the deed, operating by relation, divested the defendant of his legal title from the date of the sale, and is therefore a good defence. *Mayor of Baltimore v. Peat*, 50 Atl. Rep. 152 (Md.).

Deeds of property sold at judicial sales are generally held to vest the title in the purchaser from the time of the sale. *Pennsylvania S. V. R. R. Co. v. Cleary*, 125 Pa. St. 442. But the doctrine of relation is not considered applicable when it will injure the preëxisting rights of a third person. *Jackson v. Bard*, 4 Johns. (N. Y.) 230. It is difficult to see why in the principal case the rights of the plaintiff are not injured by allowing the deed to relate back, since he is put to the expense of two actions and exposed to the uncertainty of recovery against another person. But even were this reason invalid, it is doubtful if the doctrine of relation should be applied where the act the effect of which must be carried back, is done after the beginning of the action. Some jurisdictions have permitted such a use of the principle. *Jackson v. Ramsay*, 3 Cow. (N. Y.) 75. Other cases have held, more properly it would seem, that the fiction cannot be used to prove something which was untrue at the time the action was begun, as this would be an unnecessary and illogical extension of the doctrine. *Presnell v. Ramsour*, 8 Ired. (N. C.) 505.

**PUBLIC SERVICE COMPANIES—REFUSAL TO FURNISH NATURAL GAS—INSUFFICIENT SUPPLY.**—The defendant, a natural gas company exercising the right of eminent domain, refused to furnish gas to the plaintiff, owing to an unavoidable deficiency in its supply. *Held*, that the plaintiff must be supplied with gas, even though serious inconvenience to prior consumers results. *State ex rel. Wood v. Consumers' Gas Trust Co.*, 61 N. E. Rep. 674 (Ind., Sup. Ct.). See NOTES, p. 571.

**SALES—CHATTEL MORTGAGES—POTENTIAL EXISTENCE.**—In a jurisdiction in which a chattel mortgage passes only a legal lien, and not the title, a mortgage of certain hogs and of their increase was given to the plaintiff. Before foreclosure the defendant attached the young of the hogs, born after the execution of the mortgage. *Held*, that the plaintiff has no right, as against the defendant, to the young of the animals. *Battle Creek Valley Bank v. First Nat. Bank*, 88 N. W. Rep. 145 (Neb.).

That legal rights may be passed in the future increase of property already owned, is a generally recognized doctrine. *Grantham v. Hawley*, Hob. 132. So it has been held that the unborn offspring of animals may be sold, and the title passes when they are born. *Hull v. Hull*, 48 Conn. 250. The same rule has been applied to chattel mortgages, in jurisdictions where a mortgagee gets title. *Rogers v. Highland*, 69 Ia. 504. So, too, it has been held that a lien may be given on unborn animals. *Sawyer v. Sawyer*, 70 Me. 254. Although there has been some tendency to limit, in various ways, the application of the doctrine under discussion, there seems to be no authority and no valid reason for distinguishing in this regard between lien and title, as is done in the principal case. The court mainly relies upon a case in which the young were not included in the terms of the mortgage, and which therefore is hardly authority. *Shoebert v. De Motta*, 112 Cal. 215. The question has been decided in the opposite way in another jurisdiction, according to what would seem the better reason. *First Nat. Bank v. Western Mortgage Co.*, 86 Tex. 636. No other exactly parallel cases have been found.

**SALES—DAMAGES—BREACH OF WARRANTY.**—The plaintiff sold a machine to the defendant, warranting it to be of a certain capacity. There was in fact no machine on the market of such capacity. *Held*, that the measure of damages for the breach of warranty is the difference between the purchase price and the actual value of the machine as delivered. *Huyett-Smith Mfg. Co. v. Gray*, 40 S. E. Rep. 178 (N. C.).

Where a purchaser seeks redress for a breach of a contract of warranty, the better rule is that the measure of damages is the difference between the value of the article



as delivered and its value had it been as represented. See 14 HARV. L. REV. 454; *Tuttle v. Brown*, 4 Gray (Mass.) 457; but cf. *Van Winkle v. Wilkins*, 81 Ga. 93. Where, however, the ascertainment of damages on this basis would be clearly only matter of conjecture, the rule sometimes breaks down. *Ferris v. Comstock*, 33 Conn. 513. No such difficulty appears, however, in the principal case. Ordinarily the value of the article as represented is proved by showing the market value of such commodities. See *Bach v. Levy*, 101 N. Y. 511. Where articles such as were contracted for are not on the market, the mode of proof may be affected, but the measure of damages should not ordinarily be changed. In such cases the contract price, which is always admissible to show the value of the thing contracted for, becomes important evidence as to that value. See *Cary v. Gruman*, 4 Hill (N. Y.) 625; *Tatum v. Mohr*, 21 Ark. 349. It is not, however, conclusive. *Willis v. Dudley*, 10 Ala. 933. In the principal case it would seem a simple matter to prove by expert evidence the value of a machine having the capacity warranted. Cf. *Willis v. Dudley*, *supra*.

**SALES — MORTGAGE OF AFTER-ACQUIRED PROPERTY — EQUITABLE LIEN.** — *Held*, that a mortgage of securities to be thereafter issued gives a valid equitable lien, which attaches to the securities as soon as they come into the mortgagor's hands. *Central Trust Co. of New York v. West India Improvement Co.*, 169 N. Y. 314.

The New York court has fluctuated between the view that a mortgage of after-acquired property gives a valid equitable lien, and the view that, as against third persons, the mortgagee acquires no rights, unless he takes possession of the property before their rights attach. The decision in the principal case is rested on the authority of the older cases. *McCaffrey v. Woodin*, 65 N. Y. 459; *Kribbs v. Alford*, 120 N. Y. 519. It is not noticed that the more recent New York decisions are based upon the other view. *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570; *New York, etc., Co. v. Saratoga, etc., Co.*, 159 N. Y. 137. The weight of authority, however, both in England and in the United States, supports the principal case. *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story (U. S. Circ. Ct.) 630; *Cumberland Nat. Bank v. Baker*, 57 N. J. Eq. 231; but see, *contra*, *Moody v. Wright*, 13 Met. (Mass.) 17. On equitable principles the prevailing view would seem to be sound. The question is generally of importance only when the mortgagor becomes insolvent; and in that case, if the mortgagee is denied a lien, he is deprived of the security by which he was induced to advance his money, while the debtor's estate has the benefit of both the money and the property. Obviously, however, the mortgagee's equitable lien cannot prevail against *bona fide* purchasers for value.

**SALES — STATUTE OF FRAUDS — WRITTEN MEMORANDUM AND SUBSEQUENT ORAL MODIFICATION.** — A seller being unable to continue prompt deliveries of flour under a written contract, the parties orally agreed upon a definite postponement of future deliveries. The seller, suing on the original contract, proved the oral transaction to excuse his non-performance of the written terms. *Held*, that the transaction shows no sufficient excuse. *Walter v. Bloede Co.*, 50 Atl. Rep. 433 (Md.).

Assent to postponement presumably did not bind the defendant as a waiver, for the court does not discuss it as such, and it was probably seasonably retracted. The plaintiff should succeed, then, only if the oral agreement postponing deliveries was enforceable as a contract. According to some American cases the Statute of Frauds does not affect such an agreement, it being styled a contract merely for a substituted performance. *Cummings v. Arnold*, 3 Met. (Mass.) 486; *Clark v. Dales*, 20 Barb. (N. Y.) 42. The English courts and some of our states have adopted an extremely opposite doctrine, that any subsequent oral contract is invalid, except one simply rescinding an executory contract to sell. *Stead v. Dawber*, 10 A. & E. 57; *Bailey v. Epperly*, 2 Ind. 85. This rule is perhaps too broad, for the question is always whether a given substitutionary contract is for the sale of goods. See *Tyers v. Rosedale, etc., Co.*, L. R. 8 Ex. 305, 318. The English rule is applied in the principal case, where the result reached is correct. The oral contract had two parts, a rescission of the promises of deliveries and payments on the dates first set, and new promises for deliveries and payments on other dates. This latter part was a contract for a sale, and therefore within the statute.

**STATUTE OF LIMITATIONS — AMENDMENT OF DECLARATION AFTER STATUTORY PERIOD.** — A statute authorized administrators to sue for the benefit of heirs at law in cases of wrongful death. Within the statutory period an administrator brought an action, failing to name the beneficiaries as required. After the statute had run, he

amended his declaration by inserting the names of the beneficiaries. *Held*, that the statutory bar cannot be interposed. *Love v. Southern Ry. Co.*, 65 S. W. Rep. 475 (Tenn., Sup. Ct.).

Whether amendments are to be allowed or refused is almost wholly within the discretion of the court. *Chirac v. Reinsicker*, 11 Wheat. (U. S.) 280. But modern authorities greatly favor allowing them to prevent failure of justice. *Stebbins v. Lancashire Ins. Co.*, 59 N. H. 143. The fact that the statutory period has expired while the suit is pending is regarded as a strong reason for allowing the amendment. *Sanger v. Newton*, 134 Mass. 308. In such cases the running of the statute is arrested at the date of filing the original pleading, unless the amendment sets up a new cause of action or introduces new parties. *Blanchard v. Lake Shore, etc., Ry. Co.*, 126 Ill. 416; *Hills v. Ludwig*, 46 Oh. St. 373; *Flatley v. Memphis, etc., Ry. Co.*, 9 Heisk. (Tenn.) 230. The amendment in the principal case does not introduce new parties, as the action is continued in the name of the administrator, the heirs at law being named only as beneficiaries. Nor does it seem that in any real sense a new cause of action is set up. The amendment cures a purely formal defect, and both declarations are obviously based on the same cause of action. The case reaches a very desirable result and is supported by good authority. *South Carolina Ry. Co. v. Nix*, 68 Ga. 572; *Huntingdon, etc., Ry. Co. v. Decker*, 84 Pa. St. 419. There is, however, some authority the other way. *Atlanta, etc., Ry. Co. v. Hooper*, 92 Fed. Rep. 820.

STATUTE OF LIMITATIONS — APPLICATION TO BILL TO REMOVE CLOUD ON TITLE. — Neb. Code, § 16, enacts that "An action for relief not hereinbefore provided for, can only be brought within four years after the cause of action shall have accrued." § 2 abolishes the distinction between actions at law and suits in equity. *Held*, that the statute constitutes no defence to a suit to remove a cloud on title. *Batty v. City of Hastings*, 88 N. W. Rep. 139 (Neb.).

Statutes of limitations formerly applied expressly only to actions at law, but the spirit of these statutes is followed in equity, and at the present day they often in terms include equitable suits. WOOD, LIM., § 58. While at law a cause of action must be a breach of legal duty, in equity a suit may be brought to procure a deserved benefit or to relieve from hardship, without any previous wrongful act on the part of the defendant. The question then arises whether the causes of action in suits of the latter class are within the statutes. The authority, though scanty, seems uniformly opposed to such a view. *Schoener v. Lissauer*, 107 N. Y. 111. The reasons on which the statutes are based have very little application to cases of this class, and the fact that the outstanding claim is an old one makes its cancellation no less just and desirable. In the principal case therefore the decision, though not founded on a literal construction, seems not to conflict with the intention of the statute. The plaintiff may of course still be barred, if guilty of laches.

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## BOOKS AND PERIODICALS.

INSANITY IN RELATION TO CONTRACTS. — It is the law of England that an insane person is liable upon his contracts as if sane unless, in addition to his own insanity, he proves that the other party knew of his condition. *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599. This decision, though previously assailed in England, finds support in a recently published article. *Lunacy in Relation to Contract, Tort, and Crime*, by Rankine Wilson, 18 L. Quart. Rev. 21 (Jan., 1902). In Mr. Wilson's view the case decides merely that insanity shall not be a defence unless the "party alleging it was so insane as not to be capable of understanding what he was about," and then goes on to establish a test of such insanity which shall be "whether the other party can be affected with knowledge." It requires no little ingenuity to find in the language of the decision any indication that such was the meaning of the court. ANSON, CONTRS., 9th ed., 125. The defendant, by hypothesis, having already proved that he was incapable of understanding what he was about, no test by means of which that

fact might be established could possibly be needed. Admitting, however, that the language is capable of this construction, the change is one of form merely and the practical result remains the same. The sole issue should be whether the person alleging insanity was capable of understanding the contractual act. In determining that question it is by no means apparent how the knowledge of one party affords, as is contended, a test which is both absolute and practically unerring. Applied to the case of contracts made by insane persons who are to all appearances sane, or to agreements entered into by correspondence, this test fails entirely to aid in ascertaining the truth. The incapacity of the defendant to perform a contractual act remains the same, however ignorant of it the plaintiff may be. Nor is an inquiry into the mental condition of one person in the least aided by evidence as to the state of mind of another. When it is considered that the heavy burden of proving knowledge is upon the insane, the doctrine appears to be a return toward the harsh rule of the common law, that no man can "stultify himself" by pleading his own insanity.

Mr. Wilson's position finds little support among modern authorities. *Edwards v. Davenport*, 20 Fed. Rep. 756; *Seaver v. Phelps*, 11 Pick. (Mass.) 304. In the cases relied upon by the court in *Imperial Loan Co. v. Stone*, *supra*, the insane person had derived some benefit from the contract, and in such cases the law justly implies a contract to pay. *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; *Molton v. Camroux*, L. R. 2 Ex. 487. Knowledge of insanity then becomes material as a defence since a remedy in its nature equitable should not be allowed to one open to the suspicion of having imposed upon an insane person. These decisions, however, offer no support for the sweeping rule contended for which makes no distinction between executed and executory contracts. The cases in the United States which seem at first sight to accord with Mr. Wilson's view will, upon examination, generally be found to fall within the class where the relief sought is in essence quasi-contractual. *Matthiessen, etc., Co. v. McMahon's Adm'r*, 38 N. J. Law 536.

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CONDITIONAL PAYMENT BY CHECK. — The effect of a creditor's acceptance of a check sent expressly "in full satisfaction" of a larger claim has been the subject of some difference of opinion. The English courts leave it to the jury to decide whether the creditor accepted the check in final settlement or merely as a payment on account. *Day v. McLea*, 22 Q. B. D. 610. Numerous American decisions, on the contrary, hold as matter of law that acceptance of such a check discharges the entire claim. *Logan v. Davidson*, 18 N. Y. App. Div. 353. A brief discussion of the question appears in a recent article, in which, however, the author has done little more than to re-state the present English law. *Cheques in Settlement*, by G. Pitt-Lewis, 112 L. T. (London) 49, Nov. 16, 1901. In jurisdictions where a liquidated claim cannot be discharged by a smaller payment, either in *specie* or by check, the question obviously is confined to disputed claims. *Meyer v. Green*, 21 Ind. App. 138. But in all other jurisdictions it concerns both unliquidated and liquidated claims; for these jurisdictions either hold broadly that a smaller payment, whether in *specie* or by check, may operate in full satisfaction, or else, with the English courts, they concede that payment by check may have such effect, though payment in *specie* may not. *Clayton v. Clark*, 74 Miss. 499; *Sibree v. Tripp*, 15 M. & W. 23.

The English view, that the effect of acceptance is a question of fact for the jury, seems untenable. When a debtor makes a conditional payment by check, the creditor may honorably take one of three courses: he may accept the check in full discharge; he may passively retain it, without cashing or negotiating it; or he may return it. Unless he violate the express condition on which it was sent, he cannot apply it merely on account. He should either refrain from applying the check at all or conform to the terms imposed by the debtor; he cannot rightly substitute terms of his own. "The use of the check is *ipso facto* an acceptance of the condition." *Nassoij v. Tomlinson*, 148 N. Y. 326.

On this view, the creditor's intention in accepting the check would seem immaterial, though the English law would regard it as decisive. For if he intended to accept on the terms offered, his claim is at an end; while if he did not so intend and yet cashed the check, it should not be open to him to qualify or explain an act consistent only with such intention. In particular instances it may well be a troublesome question whether the remittance was in fact conditional. But when once the condition is established, it should follow, not as a possible inference of fact, but as a necessary conclusion of law that acceptance of such remittance is subject to the condition attached.

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PROVER AGAINST A PURCHASER FROM A CONVERTER. — There has been conspicuous lack of harmony in the decisions as to whether a pledgee or purchaser from a converter is himself guilty of a conversion before demand and refusal. The question assumes practical importance whenever action is brought before demand and also when, though demand has been made, the statutory time has elapsed since the fraudulent sale or pledge. The English law on the subject is briefly summarized in a recent article. *A Point in the Law of Conversion*, Anon., 46 Sol. J. 24 (Nov. 9, 1901).

As far back as Lord Ellenborough's time, in 1805, it was laid down unqualifiedly, though by way of *dictum*, that one who takes property "by assignment from another who has no authority to dispose of it" commits a conversion. *M'Combie v. Davies*, 6 East 538. On this view, which seems correct, there is an immediate conversion by the purchaser or pledgee, before demand and refusal, and it matters not whether his conduct is fraudulent or innocent. A later decision, however, qualifies the broad doctrine of *M'Combie v. Davies*, *supra*, holding that an innocent pledgee of title deeds is not guilty of a conversion until detention after demand. *Spackman v. Foster*, 11 Q. B. D. 99. The author submits, rightly, that the doctrine of *Spackman v. Foster*, *supra*, is indefensible on principle and unfortunate in its results. If the essence of conversion is the exercise of a dominion inconsistent with the rights of the owner, it is hard to see how demand and refusal can be necessary; or, if it is unnecessary in the case of a fraudulent pledgee or purchaser, how it can become necessary simply because the infringement on another's rights is unintentional. For whether one's motive be honest or fraudulent, by accepting the converted property in sale or pledge he does an act entirely at variance with the exclusive control of the owner. The view of *Spackman v. Foster*, *supra*, is doubtless due in part to a not unnatural desire to shield from immediate liability one whose conduct is morally blameless. But such assumed kindness operates in one respect to the disadvantage of its recipient. It fails to recognize the desirability of quieting possession. For if there is no conversion until demand and refusal, the statute of limitations cannot run in his favor till then; while the stricter and more logical doctrine would allow it to run from the outset.

The sounder view, namely, that demand is not necessary, represents perhaps the weight of American authority. *Riley v. Boston, etc., Co.*, 11 Cush. (Mass.) 11. See also CL. & L., TORTS, 2d ed., 214, and an excellent article, *Conversion by Purchase*, by Nathan Newmark, 15 Am. L. Rev. 363, 376-378. The opposite view, however, is strongly supported. *Rawley v. Brown*, 18 Hun (N. Y.) 456. See also 6 So. L. Rev., N. S., 822, 828.

**STUDIES IN HISTORY AND JURISPRUDENCE.** By James Bryce. New York and London: Oxford University Press, American Branch. 1901. pp. xxiii, 926. 8vo.

In this work the author has collected sixteen essays connected largely by a comparison of the institutions and development of Rome and of England. The striking similarities between the Roman and British Empires, and the effects of colonial experiences upon their internal development, are portrayed most interestingly and instructively. A detailed examination of the development of Roman and English law and of the place therein occupied by magistrates, by jurists, and by legislation, results in the conclusion that the best law, that marked by reasonableness, simplicity, certainty, and self-consistency, is produced slowly and tentatively under the guidance of a trained body constantly modifying and summarizing the results of natural development — a system difficult to obtain in large democratic nations. The chief features likely to affect the future development of law are thought to be the dangers accompanying the modern enormous industrial development and the growth of democracy. Mr. Bryce believes that Roman and English law must eventually replace all other systems except possibly those founded on ancient religions; that while it is not probable that either will absorb the other, a greater tendency towards the unification of the two systems may not be improbable.

In the five essays relating to jurisprudence — Obedience, Sovereignty, The Law of Nature, Methods of Legal Science, and The Relation of Law and Religion — Mr. Bryce takes a position, as opposed to the Austinian school, that law is not based upon the command of the state. Indolence, deference, and sympathy are deemed to be more potent factors conducive to obedience than either reason or fear; and while the alleged evil effects of present tendencies upon obedience are fully recognized, the author is of the opinion that at least in politics and in industry the tendency of the average man to defer to those of stronger wills must still continue. Sovereigns are divided into legal — the ultimate person or body to whose directions the law attributes legal force, assuming obedience thereto — and practical — the person or body constituting in fact the strongest force in a state; and from these definitions it is argued that sovereignty may be limited, divided, or partially in abeyance. In addition to this analytical treatment, historical conceptions of sovereignty are treated in detail.

The classification of constitutions into Flexible and Rigid is substituted for the orthodox division into Written and Unwritten. The Flexible Constitution is one that can be changed by the same authority, acting in the usual manner, which makes or changes other laws, as in England; but where amendments can be made only by a different body, as in the United States, or by the same body acting in a different manner, as in France, the constitution is designated Rigid. The dangers and advantages of the two systems are portrayed, existing constitutions are examined in the light of these principles, and the action of centrifugal and centripetal forces on political communities and institutions is discussed. Completing the chapters upon constitutional topics are several essays considering in detail the institutions of primitive Ireland and of the two South African Republics, the new constitution of Australia, and the development of our own constitutional system especially with reference to the fears and predictions of Hamilton and De Tocqueville as compared with what history shows to be the real strength and weakness of our Constitution. The body of the work closes with an essay upon marriage and divorce, in which the author examines the causes which, both in the Roman Empire and at present throughout the world, result in the increased freedom of marriage, in the growing equality of husband and wife, and especially in the tendency to make divorce more easy.

For historians, jurists, lawyers, and perhaps more especially for laymen, Mr. Bryce has again produced a work both interesting and valuable. In several instances, however, the author's conclusions may not meet with complete acceptance. Undoubtedly his treatment of jurisprudential topics does a great deal towards removing the dogmatism and misconception of historical fact with which the science has been encumbered. Yet a fuller recognition of the



conception — admittedly fundamental in Rome and in England as well as in this country — that sovereign power is derived from the people, might well result in recognizing in the people, at least in such countries as the United States and Switzerland, the legal sovereignty which the author now distributes among the various agents of the people. Again, in the new classification of constitutions, France is placed in the same class with this country; but some things which are indicated as being the striking features of Rigid Constitutions generally, seem to apply to France no more than to England. It is also to be regretted that one preëminently fitted to express an opinion is perhaps overcautious in stating what seems to him to be the probable development of the questions considered. It may be added that the awkward and unattractive form in which the American edition is presented is most unfortunate.

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**TWO CENTURIES' GROWTH OF AMERICAN LAW.** By the members of the faculty of the Yale Law School. New York: Chas. Scribner's Sons. 1901. pp. xviii, 538. 8vo.

This volume was published in connection with the bicentennial celebration of Yale University, as the contribution of the law faculty to the commemoration of that anniversary. Each of the eighteen chapters, except the Introduction, deals with a single main division of the law, discussing its development in this country during the last two centuries. Perhaps the most interesting and valuable portions of the book are found in a few chapters which enter more or less briefly into colonial history. The beginnings of a legal system are always interesting to the student of institutions, and the events, movements and tendencies of the colonial period would naturally have a considerable bearing on the subsequent development of a national system of law. There is also to be found in more than one chapter an occasional shrewd suggestion or instructive comparison, or a thoughtful generalization from scattered but related cases.

But unfortunately the greater part of the book is taken up with a mere enumeration of rules of law at present in force in this country, which have had their origin within the last two centuries. In most cases the statement is too general to be useful to the lawyer, and too brief or technical to be of value to the layman. There is seldom any attempt to explain the origin or the importance of the various rules, and they are not arranged or classified so as to indicate or illustrate general tendencies or suggest probable future development. There is a certain slight interest in running the eye over such a bare enumeration, and noting how many of the existing rules of law are of comparatively recent origin; but it is hardly to be supposed that the book was written to gratify curiosity. The chief virtue of such a catalogue would be its completeness; but here again we meet with disappointment. Such subjects as Negotiable Instruments and Conflict of Laws which, from their comparatively modern origin as branches of English and American law, especially deserve treatment in an account of the growth of our legal system, are disposed of with a brief and subordinate treatment, or a passing allusion. Similar faults are found in the individual chapters. Necessarily many unimportant matters must be omitted, but it is somewhat surprising to find no mention whatever of such a principle as the Rule against Perpetuities.

It must of course be admitted that it was no easy task to select the materials for a single volume out of the vast store included within the scope of the title; but the authorship of the book and the occasion of its publication were such as to justify high expectations. Nevertheless it is easier to criticise than to create, and the critic may therefore be pardoned if in self-defence he suggest some of the things which the reader, on first opening the book, might not unreasonably have expected to find therein. Three at least readily propose themselves. If in the enumeration of existing rules of law, all those which are peculiar to this country had been pointed out, the data at least would have been furnished from which to form a conception of the distinguishing characteristics of American law. This opportunity is neglected, for though the references to English law

are tolerably frequent, there is no consistent attempt to mark the differences between the two systems. A second suggestion strikes somewhat deeper. In a survey of the changes which the law has undergone during a long period, it is not difficult to discern certain definite movements and tendencies, the development of fundamental principles already established, and the gradual establishment of principles which are substantially new. No greater service could be done to legal education in this country than that of tracing, so far as possible, through the current of decisions and legislation, the underlying principles to which the surface changes are referable. It is only fair to say that in a few instances something of this sort is attempted in the book under discussion, and with sufficient success to make the reader regret that such attempts are so rare. A third service which the authors might have rendered is suggested by the intimate relation between the history of law and the history of politics and society. One of the most obvious examples is found in the effect, hardly to be overestimated, which the abolition of primogeniture has had on the constitution of our society. Many other instances of the connection between law and political and social history, less evident or familiar, but for that reason all the more instructive, might have been pointed out. But scarcely anything of this sort is attempted.

It is evident that to have done either of the two things last suggested would have taken a good deal of space. But on the other hand comparatively few specific cases and rules of law would have sufficed for illustration, and work of scholarly character and permanent value would thus have taken the place of a catalogue of legal rules, which can scarcely be said to make a substantial contribution to any department of legal learning. The portions of the book, already referred to, which are of genuine interest and value, are sufficient to justify its publication; but one cannot help regretting that so many excellent opportunities to add materially to the sum of legal scholarship were almost entirely neglected.

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**A TREATISE ON INTERNATIONAL PUBLIC LAW.** By Hannis Taylor. Chicago: Callaghan & Co. 1901. pp. lxxvi, 912. 8vo.

Though international law has been developed largely by text writers, and though it lends itself readily to text-book treatment, the subject has not yet been thoroughly and satisfactorily covered. Authors have differed as to the advantages of the historical method as compared with the analytical method in application to this branch of the law, and, adopting the one or the other method, have failed to give an exhaustive treatise. The author of the present work, as he shows in his preface and introductory chapter, believes in the superiority of the historical method, but recognizes that the analytical method, too, must be invoked "in order that the intent and meaning of the various and complicated rules may be clearly expounded." At the outset, the author is handicapped by the magnitude of the task which he sets before himself. To write an adequate history of international law and at the same time an adequate treatise on the rules and principles, would be well-nigh impossible within the limits of a single volume of convenient size. The author's failure to write the ideal text book is due principally to subordinating too far a clear statement and thorough discussion of the rules to an elaborate exposition of the historical growth of the law, and to lengthy citations of historical illustrative instances.

Aside from the first two parts of the book which are devoted to purely historical matter, the author, in general, has followed Wheaton's classification. On disputed points in the law, the book adds nothing to the literature of the subject, for the author gives too little attention to analysis. An instance of this is to be found in § 131, where McLeod's case is considered. Mr. Webster's view of the case is stated accurately and concisely, and the opposing attitude of the New York court is adverted to, but the author dismisses the subject without showing the underlying principle in the case which clearly justified Mr. Webster. Again in §§ 164-168, in which the learned author treats of the effect of change of sovereignty on state obligations, the views of many writers are set

out by quotation from their works; but the author sums up the views without any analysis and statement of his own. The emphasis laid on the historical growth of the law leads to the curious result of confusing rules of policy and rules of law; an instance of which may be seen in the statement of the Monroe Doctrine as a rule of law.

It is but fair to say, however, that the book is the best American work since Wheaton. Mr. Taylor appears to have spared no painstaking and to have used every endeavor to make the work accurate. As a history of international law, and more particularly as a history of the contributions of Great Britain and the United States to international law, the book will certainly find a place. Containing, as it does, citations from and reference to the leading writers on international law, and a collection of the most important decided cases in Great Britain and the United States, it is without doubt the best single reference manual for the student to own.

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A HANDBOOK OF THE CODE OF CIVIL PROCEDURE. By Carlos C. Alden. New York: Baker, Voorhis & Company. 1901. pp. vi, 170. 8vo.

This manual is perhaps the latest of those designed to simplify for bar-examination purposes the special, complicated legislation of New York. From this point of view the Code has been well edited. Twelve chapters marshal the most elementary sections, generally reprinted *verbatim*, sometimes digested. For any but the primary purpose, however, the book is ill-fitted even in the hands of a beginner; it is silent, for example, on such every-day and such intricate matters as the various sorts of motions and orders. There is an index of subjects, but none of code-sections.

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A TREATISE ON THE LAW OF FRAUD AND MISTAKE. By William W. Kerr. Third edition by Sydney E. Williams. London: Sweet and Maxwell, Limited. 1902. pp. lxxv, 557. 8vo.

A TREATISE ON THE LAW OF ATTACHMENTS, GARNISHMENTS, JUDGMENTS, AND EXECUTIONS. By John R. Rood. Ann Arbor: George Wahr. 1901. pp. 549. 8vo.

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## JAMES BRADLEY THAYER.<sup>1</sup>

**I**T was my privilege to be a colleague of Professor Thayer throughout the twenty-eight years of his law professorship. Before his return to the Harvard Law School he had declined the offer of a professorship in the English Department of the College. Although his rare gift for thoughtful, graceful, and effective writing could not have failed to make him highly successful as a professor of English, his decision not to give up his chosen profession was doubtless a wise one. Certainly it was a fortunate one for the Law School and for the law.

During the early years of his service he lectured on a variety of legal topics, but Evidence and Constitutional Law were especially congenial to him, and in the end he devoted himself exclusively to these two subjects, in each of which he had prepared for the use of his classes an excellent collection of cases. Evidence was an admirable field for his powers of historical research and analytical judgment. He recognized that our artificial rules of evidence were the natural outgrowth of trial by jury, and could only be explained by tracing carefully the development of that institution in England. The results of his work appeared in his "Preliminary Treatise on the Law of Evidence," a worthy companion of the masterly "Origin of the Jury," by the distinguished German,

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<sup>1</sup> Of these appreciations of Professor Thayer by his colleagues the first and third were prepared for the February meeting of the Colonial Society of Massachusetts, and the second for the March meeting of the Massachusetts Historical Society.

Professor Brunner. His book gave him an immediate reputation, not only in this country, but in England, as a legal historian and jurist of the first rank. An eminent English lawyer, in reviewing it, described it as "a book which goes to the root of the subject more thoroughly than any other text-book in existence."

Only a few days before his death Professor Thayer talked with me about his plans for the future, saying that he expected to complete his new book on Evidence in the summer of 1903, when he meant to relinquish that subject and devote the rest of his life to Constitutional Law, with a view to publication.

It is, indeed, a misfortune that these plans were not to be carried out. But although he has published no treatise upon Constitutional Law, he has achieved, by his essays, by his Collection of Cases, and by his teaching, a reputation in that subject hardly second to his rank in Evidence. To the few who knew of it, President McKinley's wish to make Professor Thayer a member of the present Philippines Commission seemed a natural and most fitting recognition of his eminence as a constitutional lawyer, and, if he had deemed it wise to accept the position offered to him, no one can doubt that the appointment would have commanded universal approval.

Wherever the Harvard Law School is known, he has been recognized for many years as one of its chief ornaments. When, in 1900, the Association of American Law Schools was formed, it was taken for granted by all the delegates that Professor Thayer was to be its first president. No one can measure his great influence upon the thousands of his pupils. While at the School they had a profound respect for his character and ability, and they realized that they were sitting at the feet of a master of his subjects. In their after life his precept and example have been, and will continue to be, a constant stimulus to genuine, thorough, and finished work, and a constant safeguard against hasty generalization or dogmatic assertion. His quick sympathy, his unfailing readiness to assist the learner, out of the class-room as well as in it, and his attractive personality, gave him an exceptionally strong hold upon the affections of the young men. Their attitude towards him is well expressed in a letter that came to me this morning from a recent graduate of the School, who describes him as "one of the best known, best liked, and strongest of the Law Professors."

The relations of the law professors are probably closer than those of any other department of the University. No one who has not known, as his colleagues have known, the charm of his

daily presence and conversation, and the delightful quality of his vacation letters, can appreciate the deep and abiding sense of the irreparable loss they have suffered in the death of Professor Thayer.

In our great grief we find our chief comfort in the thought of his simple and beautiful life, greatly blessed in his home and family, rich in choice friendships, crowned with the distinction that comes only to the possessor of great natural gifts nobly used, full of happiness to himself, and giving in abundant measure happiness and inspiration to others.

*J. B. Ames.*

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The death of James Bradley Thayer will be widely felt.

Few men had more or warmer friends. I have often thought of him as an ideal New Englander. With all the good qualities of the race, he was without the angularity of mind or character which sometimes accompany them. Of perfect good breeding, there was no company to which he was not a welcome addition. He had a breadth of nature, difficult to describe, but impossible not to feel.

He had much public spirit, and threw himself with zeal into those philanthropic movements which attracted him; some of us thought that he was at times called upon to do more than could be fairly asked from him, but he himself never measured the time nor counted the cost.

For nearly thirty years he was Professor in the Harvard Law School. He published two collections of cases, one on Constitutional Law in two large volumes, and one on Evidence in one volume of equal size, both of great excellence; the latter, it is safe to say, is the most successful of the numerous collections of authorities that have been published in the Harvard Law School during the last quarter of the nineteenth century. It is used all over the country.

It will be at another time and in another place that his long line of pupils will tell what they owe to him; to me who may have the honor to succeed him, the aid to be derived from his work is incalculable.

But it is appropriate that I should speak here especially of his historical labors, and it was his historical work that he loved the

best. Its bulk is not large. Mr. Thayer was fastidious, not in judging what others had done, for he was a generous and kindly critic, but in passing upon his own work. To discover or verify a fact which might make his material more complete, to arrange and rearrange that material so that its expression might be more perspicuous, no time or trouble seemed to him too great. But though the pages which he wrote cut no great figure when measured by the base modern standard of so many thousands of words, their quality is high.

The law of evidence is the most characteristic feature of the common law; no part of the law has reacted so strongly upon the English race. In the love of facts, and in the desire of getting those facts at first hand, which distinguish us, the common law of evidence has played a considerable part. Every one knew in a general way that our law of evidence was the offspring of the jury, but only in a general way. Here was Mr. Thayer's good fortune. There was a new country to be discovered, he seized the opportunity, and in the essays afterwards collected, revised, and published in his "Preliminary Treatise on the Law of Evidence," he worked out not only the general lines but the details of the subject in a masterly manner which ultimately satisfied that severest of judges, — himself, — and gave him a distinguished place among those eminent jurists whose contributions to legal history have illustrated the closing years of the last century.

*John Chipman Gray.*

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The work by which Professor Thayer will be best known to the next generation of lawyers is his "Preliminary Treatise on Evidence at the Common Law." What is the impression which that book will make upon a legal reader who was an entire stranger to the author?

One of the first impressions would relate to the character of the writer. The reader will undoubtedly say that the man who stands behind this book must have been a person of singular modesty and remarkable candor. Here is a man who puts forward original ideas and important views without flourish of trumpets or claiming the merit of discovery; a man who never overstates the case in support of his own theories, and is always careful to give



full space and due weight to the argument opposed to his own views. Every page bears evidence of the quality which Martineau calls "intellectual conscientiousness."

But the competent lawyer who reads this book in the next generation will not stop with the conclusion that it was the work of an honest man. He will say that it proceeds from an intellect which is both profound and patient. He will praise not only the substance, but also the arrangement of the topics. Every brick in the edifice is laid in its proper place, and every brick was carefully rung before it was laid. There was first a careful investigation of authorities ; and then a reëxamination of the subject as if it were a new matter.

Professor Thayer goes straight to the fundamentals of the topic. He does not content himself with repeating stereotyped formulas, nor is he satisfied with half solutions of difficulties. On the contrary, he gets behind the ordinary explanations. He does not fall into the mistake, alluded to by Fitzjames Stephen, of supposing that the rules of evidence "had an existence of their own apart from the will of those who made them." Instead, he takes us back to the very birth of these rules, and shows when, why, and how each of them came to be. Nothing can exceed his thoroughness in this respect. I know of nothing which has ever been written on the subject which lets in such a flood of light, nothing which so well brings the student to the right point of view, as some passages in this treatise. Take, for instance, the statement (page 264) that the "excluding function is the characteristic one in our law of evidence ;" or, as he puts it in other words (page 266), the rejection on practical grounds "of what is really probative" is "the characteristic thing in the law of evidence ;" which, as he felicitously adds, stamps it "as the child of the jury system." Or, again, take his comment on the familiar Latin maxim which briefly tells us that questions of law are for the judge and questions of fact for the jury. Professor Thayer says that this maxim "was never true, if taken absolutely." No doubt it is *only* fact which the jury are to decide (page 187), but there never was any such thing as "an allotting of all questions of fact to the jury. The jury simply decides some questions of fact" (page 185).

Nor would the reader stop with admiring the thought displayed in the Treatise, or with the conviction that the book was the work of an honest man and a profound intellect. He would also admire the style, the words and phrases in which the thoughts are expressed. The writings of Professor Thayer have, in that respect,

a charm which finds its closest recent parallels in the judicial opinions of Lord Bowen and the legal discussions of Sir Frederick Pollock. Right here let me add that the character of a man has a great effect upon his style as an author. We say of Professor Thayer, as has been said of Chief Justice Marshall, that his most marked and distinguished personal trait was simplicity, using that term in its highest and best sense. Dean Swift tells us that faults in style are, nine times out of ten, owing to affectation rather than to want of understanding. When men depart from the rule of using the proper word in the proper place, it is usually done in order "to show their learning, their oratory, their politeness, or their knowledge of the world." "In short," says the Dean, "that simplicity, without which no human performance can arrive to any great perfection, is nowhere more eminently useful, than in this." No motives of vanity or display could ever be attributed to Professor Thayer.

But why did we have from Professor Thayer only a Preliminary Treatise? Why did he spend his strength on that, instead of at once putting forth a practical treatise on the Law of Evidence as now administered by the courts? The answer is to be found in the Introduction to the published work; and it marks both the honesty and the thoroughness of the man. Many years ago he began to write a practical treatise. But after he had made a beginning, he found the need of going largely into the history of the subject, and also making a critical study of certain related topics which overlies and perplex the main subject. He went into those examinations, he spent an immense amount of time upon them; and these tasks occupied all the spare moments of his remaining years. The results are gathered in the published volume; a work of infinite value, which, if he had shrunk from undertaking it, would not have been achieved at all during the present generation. At the conclusion of the Introduction, he said: "I have a good hope of supplementing this volume by another of a more practical character," "giving a concise statement of the existing Law of Evidence." But this hope remains unrealized. "The ploughshare is left in the furrow." The dream of his later years is unfulfilled.

While the profession is grateful for what our friend has given us in the way of legal authorship, yet lawyers will ask each other: Why was not more work completed in all these years and given to the world; why were not his wider plans of book-making fully carried out?

To these questions more than one answer can be given. First: Professor Thayer had an absolute horror of what some one calls "immature authorship and premature publication." We may well apply to him some of the words which Stuart Mill uses in reference to John Austin: "He had so high a standard of what ought to be done, so exaggerated a sense of deficiencies in his own performances," that he accomplished less in the way of authorship than he seemed capable of; "but what he did produce is held in the very highest estimation by the most competent judges." Professor Thayer is fully entitled to the encomium which the officiating clergyman, at the funeral of Dr. Bishop, pronounced upon that distinguished jurist: "No page, no line, no word ever left this man's hand for the printer, until it was as perfect as he had power to make it."

Another reason for the failure of Professor Thayer to accomplish more in the line of legal authorship is one that is most creditable to his kindly and helpful nature. He repeatedly, we might almost say daily, turned aside from his own work to render assistance to other writers, often to those whose subjects were entirely outside of law. His services as a critic and reviser were frequently sought by friends, and were always cheerfully given. When a manuscript had received the benefit of his revision, it was reasonably certain to be in good taste and in good English. A list of the works whose authors are indebted in this way to Professor Thayer would show why he had not more time for his own books. Instead of concentrating his energies on attaining fame and fortune for himself, he preferred to pause by the wayside in order to render unpaid service to his friends. Those who are familiar with a certain memorial poem of Whittier's cannot but think of the lines:—

"All hearts grew warmer in the presence  
Of one who, seeking not his own,  
Gave freely for the love of giving,  
Nor reaped for self the harvest sown."

Professor Thayer's services as a teacher of law can be best described by those who have been his pupils; and one of them will speak of him in this REVIEW; but a few words may be said here. He made teaching his first object. No matter what other work he had on hand, no matter how many previous classes had been carried by him over the same ground, he always made careful preparation for each new meeting of the class. In one respect our friend's innate modesty may have been a disadvantage to him

as a teacher. I suspect that it sometimes led him to refrain from putting due emphasis on his own original views ; and this may have prevented the poorer part of the class from fully appreciating the intrinsic importance of those views. But he kept steadily in sight the salient points and fundamental distinctions, and these were generally grasped and retained by the better men. In this connection I might cite the testimony given to me before Professor Thayer's death by one of his former pupils, who had been out of the Law School seven years. "When we were in the Law School," said he, "we sometimes complained of lack of definiteness on Professor Thayer's part. But now that we have been in practice all this time, we find that what he said stands by us better than what was said by anybody else."

The fear has often been expressed that, with the great increase in the number of Law Students, the personal relation between teacher and pupil would cease to exist. But on the day of Professor Thayer's funeral convincing proof was afforded of the regard in which he was held by his pupils. In the midst of the severest storm of the winter, five hundred students came out to escort the procession from the house to the Chapel.

As a conversationalist I have known only three men whom I should put in the same class with Professor Thayer. There was always the right word and the right turn given to each phrase ; with no appearance of effort ; no display of learning ; and never the remotest suspicion of talking for momentary effect. He was with his pen equal to what he was in speech. He was the one to whom we all turned when memorials and epitaphs were to be written. We all feel to-day that the lips are silent which alone could pay a worthy tribute to such a man.

A welcome guest in all social circles, Professor Thayer was, nevertheless, entitled to the high praise which was bestowed on another eminent Massachusetts lawyer : "That the best wine of his companionship was kept for his own home." And I cannot refrain from adding that it was an ideal home.

Until within a twelvemonth Professor Thayer was a remarkably vigorous man for his years, but he began lately to be conscious of some diminution of physical strength. In July he wrote to me from Bar Harbor that, if he could complete a second volume on Evidence during the next college year, he should be tempted to drop that part of his school work and keep only Constitutional Law ; adding : "If indeed by that time, I be not ripe for going on the shelf entirely." "The head," he said, "seems all right yet, —

so far as I can judge, — but in other regions time is telling. Fast walking and mountain climbing are for others now."

The end came suddenly, but now that the first shock is over, his friends can hardly regret that he was spared the alternative of a long and painful season of ill health. Rather would we say of him: *Felix non tantum claritate vitæ, sed etiam opportunitate mortis.*

*Jeremiah Smith.*

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In 1885 when I entered the Harvard Law School, Professor Thayer was teaching Criminal Law to the First-year class, Sales and Evidence to the Second-year class, and Constitutional Law to the Third-year class. I studied all these subjects under him, and I can still see clearly before me the teacher of those days. The impression of the first weeks of the course was deepened but not altered in the three years I remained a student. The two most striking characteristics of his teaching were the charming personal courtesy felt in all his discussions with his class, and the painstaking accuracy which he exhibited himself and without which no student, however brilliant, could satisfy him.

Every teacher of large classes must consciously or unconsciously adjust his main efforts to the minds of a portion only of his students. The brilliant, the mediocre, and the dull cannot always get nourishment from the same food. It was to the better men in his classes that Professor Thayer's teaching was chiefly addressed. His desire seemed rather to fathom the depths of the subject before him than by evading difficulties and exceptions to present the simpler outlines of the law in such fashion that the dull and the slow could comprehend them. He was infinitely patient with the poorly gifted, but he did not let the limits of their comprehension define the boundaries of the work in his courses.

In the preface to the Cases on Evidence, Professor Thayer wisely points out that the "case system" is a system of study, not of teaching. The preparation for the regular conferences between the instructor and his pupils is the study of cases. But "as for methods of teaching, that is another matter. These must, indeed, have relation to any particular methods of study that are prescribed or recommended, but they are not necessarily determined by them. In law, as in other things, every teacher has

his own methods, determined by his personal gifts or lack of gifts, — methods as incommunicable as his temperament, his looks, or his manners." In the rooms of some instructors a case has its chief importance as presenting to the mind of the student in a concrete form a question of law which is to be discussed. What the court decided or said about the question is merely a starting-point for analytical discussion. This was not Professor Thayer's method. He had little inclination to develop from his own mind a perfectly logical or entirely consistent body of legal doctrine. If the law as he found it was neither logical nor consistent, the effort of his teaching was to show exactly what the law was, and how it had grown up in this way rather than to work out a more systematic and logical theory than the courts had made. Accordingly, he aimed to bring out the precise legal significance of each case he dealt with. The exact question of law decided by the court was the fundamental thing to be considered, and to this end he was particular to have it carefully noted how the case had been carried to the higher court, and the nice shades of distinction depending on this. I have always thought his analysis of a case more exact and complete than that of any one else I ever knew. He never found more in a case than actually was there, and nothing that was there escaped him. His originality lay chiefly in the depth of his historical research, the accuracy of his restatement of the law, and the logical acumen with which he traced the consequences of a recognized principle. His definition, for instance, of the law of evidence as determining among probative matters what classes of things shall not be received, may seem an obvious matter, yet consistently applied to the whole subject it led to clearer conceptions in many directions.

It was in accordance with his habitual carefulness that he would rarely express an opinion as to a matter which he had not thought over and studied. If a question aside from his subject came up by chance in his class-room, unless he happened to have exact and thorough knowledge on the point, he preferred not to express an opinion, and had no embarrassment in confessing ignorance. But on questions which properly belonged to the subjects which he taught, he had arrived after long study at settled opinions; and these, though always modestly expressed, were firmly held. He was not hasty in reaching a conclusion, but when reached he rarely found cause to change it.

After all has been said in regard to details of manner and method, doubtless the chief reason of Professor Thayer's success

as a teacher, the reason why his courses on Evidence and Constitutional Law, though elective, were taken by one entire class after another, was because he had made himself a master without a peer of those subjects, and the students were aware of this and profited by it. Few indeed of them, however, can have attended his lectures without learning more than the legal doctrines which were the direct objects of their study. Something at least of the accurate and careful habits of mind, the patience in wearisome investigation, the absolute intellectual sincerity, the never-failing kindness and courtesy, which distinguished the teacher, must have borne fruit in the minds and hearts of the pupils.

*Samuel Williston.*



## THE PRIVILEGE AGAINST SELF-CRIMINATION; ITS HISTORY.<sup>1</sup>

THE history of the privilege against self-crimination has something more than the ordinary interest of a rule of evidence, — not only because the privilege has been given a constitutional sanction in nearly every one of our jurisdictions ; nor merely because the tracing of its origin takes us back, in our survey, to the time of William the Conqueror ; but particularly because the woof of its long story is woven across a complicated warp composed in part of the doctrines of the early canonists, of the continuous contest between the courts of the common law and the church, and of the political and religious issues of that convulsive period in English history, the days of the dictatorial Stuarts. To disentangle these various elements, while keeping each in sight and unbroken, is a complicated task.

To begin with, two distinct and parallel lines of development must be kept in mind, — the one an outgrowth of the other, succeeding it, and yet beginning just before the other comes to an end. The first is the history of the opposition to the *ex officio* oath of the ecclesiastical courts ; the second is the history of the opposition to the criminating question in the common law courts, *i. e.* of the present privilege in its modern shape. Let us remember that there is, in the first part of this history, no question whatever of the subject of the second part, and that the second part has not yet begun to exist. The first part begins in the 1200's, and lasts well into the 1600's ; the second part begins in the early 1600's, and runs on for another century.

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<sup>1</sup> The substance of the history here set forth was printed some ten years ago in these pages (5 HARV. L. REV. 71). Since that time, a wider survey of the sources and the collection of much additional material has made it possible to trace the story more fully. This new material has served only to confirm the general results formerly outlined ; but it enables the details of the development to be more accurately filled in. The opportunity has also been taken to correct certain important miscitations and misprints occurring in the original pages, due chiefly to the writer's absence from the country at the time of the printing, and his consequent inability to revise the proof and verify the citations.

It is hard to have to add, since the above was written, that this article has been bereft of an inestimable and hoped-for advantage. Our lamented master, Professor Thayer, corresponding on the subject a few weeks before his sudden passing away, had promised to examine the article in proof.



I. Under the Anglo-Saxon rule, the bishops had sat as judges and entertained suits in the popular courts. But William the Conqueror, before 1100, had put an end to this. His enactment required the bishops to decide their causes according to the ecclesiastical law; whence sprang up a separate system and a double judicature.<sup>1</sup> By a century later, the papal power and the regal power were in hot conflict over the delimitation of their jurisdictions; in the great Constitution of Clarendon, in 1164, Henry II. temporarily gained the advantage.<sup>2</sup> By another century, Stephen and John had lost ground; and under Henry III. the influence of the leaders of the church, foreign born and foreign educated, was in the ascendant.<sup>3</sup> When Henry married his French wife, in 1236, there came over four uncles with her, one of whom, by name Boniface, was placed in the see of Canterbury as archbishop (or perhaps archdeacon). In the same year, 1236 (Matthew Paris said 1237), there came over also a Cardinal Otho. These two men were active in developing the local church law of England.<sup>4</sup> First to be noted is a constitution of Otho, promulgated at a Pan-Anglican council in London, in 1236: "*Jusjurandum calumniæ in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quo ut veritas facilius aperiatur et causæ celerius terminentur, statuimus præstari de cetero in regno Angliæ secundum canonicas et legitimas sanctiones, obstante consuetudine in contrarium non obstante.*"<sup>5</sup> Next, in 1272, came a similar constitution from Boniface: "*Statuimus quod laici, ubi de subditorum peccatis et excessibus corrigendis per prælatos et judices ecclesiasticos inquiritur, ad præstandum de veritate dicenda juramentum per excommunicationis sententias, si opus fuerit, compellantur.*"<sup>6</sup> Meanwhile, the general struggle between papal and royal claims of jurisdiction had gone on. Under Edward I., the statute of *Circumspecte Agatis* (1285) favored the former's rights.<sup>7</sup> But by the early 1300's the statute *De Articulis Cleri*<sup>8</sup> set fairly

<sup>1</sup> Stubbs, Sel. Chart., 85, Const. Hist., ii. 171; Pollock & Maitland, Hist. Eng. Law, i. 66, 67, 432.

<sup>2</sup> Poll. & Mait., i. 104 ff., 430 ff.

<sup>3</sup> Stubbs, Const. Hist., ii. 57-65; Poll. & Mait., i. 100; Gneist, Const. Hist., i. 240.

<sup>4</sup> Poll. & Mait., i. 93, 94, 103; Gibson's Codex Jur. Eccl. Angl., 1011; Lindwood's Provinciale, preface to parts I. and II.; Jura Ecclesiastica, ii. 90; Coke, 12 Rep. 26; 2 Inst. 599, 657.

<sup>5</sup> Lindwood, pt. ii. p. 60; Gibson, 1011; 12 Rep. 28.

<sup>6</sup> Lindwood, pt. i. p. 109; 12 Rep. 26. In the notes to Lindwood, it is added that the laymen, "*suffulti potestate temporalium dominorum, in hujusmodi inquisitionibus citati noluerunt jurare de veritate dicenda.*"

<sup>7</sup> Statutes of the Realm (Cay), i. 101.

<sup>8</sup> Statutes, i. 209; 2 Inst. 600. The date given by the editors, Cay and Tomlins, is

definite limits ; it was enacted that the royal officers should not permit "*quod aliqui laici in ballione sua in aliquibus locis convenient ad aliquas recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis.*" Such are the preliminary data at the opening of this first part of the history. What was their significance for the relation of the parties to the contest ?

First of all, note that the opposition therein reflected had nothing to do with any objection to the general process of putting a man on his oath to declare his guilt or innocence ; they concerned only the questions (*a*) *who* should have the right to do this, and (*b*) *how* it should be done. Moreover, the former of these things is alone at first concerned ; later, the second comes to dominate in importance. Three stages are fairly well marked, namely, (1) to Elizabeth's time, (2) to Charles I.'s, (3) and afterwards.

1. *a. Who* should have the rights of jurisdiction ? This was in the 1200's and 1300's the great question. The statute *De Articulis Cleri* settled the line of ecclesiastical jurisdiction over laymen by confining it to causes matrimonial and testamentary ; and this in substance prevailed till the end of church courts in England.<sup>1</sup> The forms of writs of prohibition were thereafter based on this statute.<sup>2</sup> A century later, in 1402, under Henry IV., the papal or clerical power obtained some sort of enlargement of its "liberties and privileges ;" <sup>3</sup> but under Henry VIII. this foreign and papal domination was repudiated, and in 1533<sup>4</sup> all canons "repugnant to the customs, laws, or statutes of this realm" were forbidden to be enforced. Under Mary, for a moment, in 1554,<sup>5</sup> the statute of Henry was repealed ; but Elizabeth, in 1558,<sup>6</sup> took care promptly to restore it. Thenceforward the struggle of jurisdiction is against Elizabeth's own High Commission Court, and not against a foreign and papal power.

*b.* In the other important respect, namely, *how* the church courts should proceed, there is, as yet in the 1200's and 1300's, apparently

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*tempore incerto* before the end of Edward II.'s reign (1326). Coke attributes it to the first few years of Edward I. ; but this, for several reasons, is improbable. In 9 Edward II. (1316), certain *Articuli Cleri* had been presented by the clergy in a futile protest against the narrowness of their powers: Statutes, i. 171 ; Lindwood, pt. iii. p. 37 ; 2 Inst. 601, 618.

<sup>1</sup> With sundry detailed variations, noted in Poll. & Mait. i. 105 ff.

<sup>2</sup> Reg. Brev. 36 *b* ; Fitzh. Nat. Brev. 41 A ; Nichols' Britton, f. 35 *b*.

<sup>3</sup> St. 4 H. IV. c. 3.

<sup>4</sup> St. 25 H. VIII. c. 19 ; a statute "for the submission of the clergy to the king's majesty."

<sup>5</sup> St. 1 & 2 P. & M. c. 8.

<sup>6</sup> St. 1 Eliz. c. 1, §§ 6, 10.

no interference or hostile feeling at all, in relation to the methods that here concern us. It does not appear that the decrees of Otho and Boniface, above quoted, authorizing certain oaths to be employed, met with any more opposition than other acts done in assertion of the church's jurisdiction. The oath was plainly permitted, by the statute *De Articulis Cleri*, in causes matrimonial and testamentary; there was no objection to it as such. How could there be, in a community where the compurgation system was still in full force in the popular and the royal courts, and men might be forced to clear themselves by their oaths with oath-helpers, — where they even struggled for the privilege of it, for centuries afterward, against the innovation of jury trial? <sup>1</sup> The writs of prohibition, set forth by Britton and Fitzherbert,<sup>2</sup> mentioned an oath, to be sure; but, in the first place, this might equally be the compurgation oath (not the *jusjurandum calumnie* or *de veritate*); and, in the next place, and chiefly, it was mentioned simply as a descriptive feature of the forbidden jurisdiction, — as if one should forbid writs of *habeas corpus* to be issued by a probate judge, not meaning in the least to strike at that sort of writ, but at the particular judge's power and jurisdiction. There is no reason whatever to believe that the statute *De Articulis Cleri* had among its motives any animus against the church's imposition of an oath as such.<sup>3</sup>

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<sup>1</sup> Thayer, Preliminary Treatise, 25, 27.

<sup>2</sup> Cited *supra*.

<sup>3</sup> The only suggestion ever made to this effect has come from Coke, who claimed (12 Rep. 28) that in this respect Otho's constitution of 1236 was "against the law and custom of England," and that the statute 25 H. VIII. c. 14, cited *infra* (which he rewrites to suit his claim), merely restored the common law. His only authority is the concluding clause of Otho's above-quoted decree of 1236, "*obtenta consuetudine in contrarium non obstante*." This clause, however, plainly applies, not to English custom, but to the church's own law; for not only was the use of any inquisitorial oath a new thing at that time in the church's procedure (as explained *post*), but this particular form of oath was in the 1200's being much enlarged in its application. The form *jusjurandum calumnie* (which, as explained *post*, included the oath *de veritate dicenda*) had been in 1125-30 not yet usable, in the church's practice, for clerical persons and in spiritual causes: Corp. Jur. Canon., Decretal. ii. 7, *de jur. calum.* cc. 1, 2, so, too, in 1145-53 "*inusitatum est*": ib. c. 4; by 1181 it was authorized for the clergy, "*consuetudine non obstante*": ib. c. 5; and finally, by 1294-1303, under Boniface VIII., it was prescribed in all spiritual causes: Sexti Decretal. ii. 4, *de jur. calum.* cc. 1, 2; compare also Lindwood, ii. 60. All this shows plainly enough what Otho meant in prescribing it for spiritual causes in England, in 1236, by his "*obtenta consuetudine in contrarium non obstante*;" and Coke's argument falls to the ground.

There is, to be sure, an apparently opposing passage (not cited by Coke) in the Constitution of Clarendon, c. 6, of 1164 (Stubbs, Sel. Chart., 238): "*Laici non debent accusari nisi per certos et legales accusatores et testes in prasentia episcopi, ita quod arch-*

Nevertheless (though the king's lawyers cared nothing about it) this procedure of Otho's and Boniface's, the *jusjurandum de veritate dicenda* (which we may call the inquisitional oath, as distinguished from the compurgation oath)<sup>1</sup> was then, for the church, an innovation. Hitherto, the trial by compurgation, or formal swearing of the party with oath-helpers, and the trial by ordeal, had been the common methods of ecclesiastical trial and decision. But in the early 1200's, under the organizing influence of Innocent III., one of the first great canonists in the papal chair (1198-1216), new ideas were rapidly germinating in church law.<sup>2</sup> The trial by ordeal was formally abolished by the church in 1215.<sup>3</sup> The trial by compurgation oaths "was already becoming little better than a farce."<sup>4</sup> There was a decided need of improvement in method. One of the marked expedients in this improvement was the inquisitional or interrogatory oath, introduced and developed in the early 1200's, chiefly by the decretals of Innocent III.<sup>5</sup>

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*diaconus non perdat jus suum.*" But this could not refer to Otho's new oath of 1236, for the simple reason that the latter did not come in, nor anything of the kind, until the next century (see the citations *post*). Moreover, this particular Clarendon clause (whatever it meant) seems not to have been opposed to the church's claims, for in a Vatican MS. of that constitution, it is said, while two other clauses are marked "*toler.*," and the rest "*damn.*," this clause 6 is ignored entirely: Gieseler, Eccles. Hist., Hull's ed. 1857, iii. 65; Smith's Hull's ed. 1857-8, ii. 289 (the contrary statement, in Poll. & Mait., i. 437, that "the pope seems to have condemned this constitution as a whole," is based upon authorities not here accessible for comparison). Probably the Clarendon clause was aimed at some sort of reform in the compurgation system, which was then degenerate (as noted *post*); moreover, who could be an "*accusator*" was then a much discussed question in church law: Decretal. ii. 7, *de accus.* Or it may have concerned the then changing judicial relation between the archdeacon and the episcopal ordinary: Schulte, Kathol. Kirchenrecht, § 59, iii.; Lea, Inquisition, i. 309.

Since printing, the remark has been observed in Poll. & Mait., i. 131, that the bearing of this clause is "very obscure."

<sup>1</sup> The word *inquirere* is the typical word in the passages of the Decretals issued under the new procedure.

<sup>2</sup> Schulte, Katholische Kirchenrecht, 1873, 3d ed., § 100, iii.; Poll. & Mait., i. 426; Lea, Inquisition, i. 309; Gieseler, Eccles. Hist., Hull's ed., iii. 157. This new movement was part of a general one, affecting also the substantive law of the church; on the procedure side, the rise of the papal inquisition of heresy, in the late 1200's, was another related phase.

<sup>3</sup> Thayer, Prelim. Treatise, 37; Lea, Superstition and Force, 4th ed. 419.

<sup>4</sup> Poll. & Mait., i. 426, 425.

<sup>5</sup> The first appearance of it, as administered to a party accused, seems to occur in Innocent's decretals of 1205 and 1206 (Decretal. v. 1, *de accusationibus*, cc. 17, 18), where, as the "*forma juramenti*," the persons charged "*meram et plenam dicant inquisitoribus veritatem*;" so also in 1208: ib. ii. 27, *de sententia*, c. 22 (an instructive case). As still a secondary resort, it appears, soon afterwards, under Honorius III., in 1216 (ib. ii. 24, *de jurejurando*, c. 32); and by the time of Gregory IX., in 1239, Innocent IV., in 1245, and Boniface VIII., 1294-1303, it comes to be the usual require-

The time-worn compurgation oath had operated as a formal appeal to a divine and magical test or *Gottesurtheil*; there was no interrogation by the tribunal; the process consisted merely in daring and succeeding to pronounce a formula of innocence, usually in company with oath-helpers.<sup>1</sup> But the new oath pledged the accused to answer truly,<sup>2</sup> and this was followed by a rational process of judicial probing by questions to the specific details of the affair, after the essentially modern manner. The former oath operated of itself as a decision, through the party's own act; the latter merely furnished material for the judge with which to reach a personal conviction and decision. This was an epochal difference of method. Indeed, the radical part played, for the progress of English procedure, by the new jury trial in the 1200's and 1300's, was paralleled, in a near degree, for ecclesiastical procedure, by the inquisitional oath in the 1200's. There were, to be sure, as time went on, several varieties of form to the oath. The chief forms were the simple *juramentum de veritate dicenda* (used in Boniface's English constitution of 1272, quoted *supra*), and the broader *jusjurandum calumnie de veritate dicenda* (used in Otho's English constitution of 1236, quoted *supra*);<sup>3</sup> but their unity consisted in the subjection

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ment and the typical mode of procedure (Sexti Decretal. i. 1, *de judiciis*, c. 1; ii. 4, *de jur. calum.* cc. 1, 2; ii. 10, *de testibus*, c. 2). As late as the Lateran Council of 1215, the old compurgation oath had still prevailed as the regular mode of trial for heresy: Decretal. v. 7, *de hæreticis*, c. 13 (= c. 3 of Concil. Lat.); but by the middle of that century the new oath became the customary instrument in the papal inquisition of heresy; which indeed owed its effectiveness largely to the new methods: Lea, *Inquisition*, i. 306, 313, 337, 411, 559.

<sup>1</sup> Brunner, *Deutsche Rechtsgeschichte*, i. 398, 427, 433, 435. For the church's compurgation oath, as distinct both in name and substance from the inquisitional or interrogatory oath, see good examples in Decretal. v. 34, *de purg. canon.* cc. 5, 13, 16; Decret. Pars II, causa V, qu. V, cc. 12, 15, 17, 19 (A. D. 1130-1148).

<sup>2</sup> "You swear that you shall make true answers to all things that shall be asked of you;" thus it was handed down in the 1600's. In the 1200's, its nature is well illustrated in a case of 1239, under Gregory IX.: Sexti Decretal. ii. 10, *de testibus*, c. 2: "*recepto juramento de veritate dicenda, iniungas dictis abbati et priori [the opposing parties], ut tam ponendo quam respondendo dicant veritatem quam super positionibus [i. e., specific allegations of fact] tibi sub bulla nostra transmissis ipsi sciunt et illos intelligunt in quorum animas juraverunt. Præterea, sigillatim super quolibet articulo in qualibet positione contento facias a partibus sufficienter adinvicem responderi.*"

<sup>3</sup> The difference between these two forms needs a little explanation. The *jusjurandum calumnie* was primarily a general pledge that the cause was a just one; and originally it had been used independently in civil cases long before the old compurgation procedure had ceased to exist, — that is, as early as the 1100's: Decretal. ii. 7, *de jur. cal.*, c. 1. But, as time went on, it came to include a clause *de veritate dicenda*, or at any rate to be associated with that oath as a preliminary to every cause; this appears from 1245 onwards: Sexti Decretal. ii. 1, *de judiciis*, c. 1; ii. 9, *de confessis*, c. 2; ii. 4, *de jur. cal.* cc. 1, 2; Lindwood, ii. 60. Thus it became associated with and equally sig-

of the accused to a rational specific interrogation for the purpose of informing the judge.

Yet there *was* a distinction of real consequence (upon which everything came later to turn), regarding the different preliminary conditions upon which a party could be put to this or any other oath. There must be some sort of a presentment, to put any person to answer. But must that come from accusing witnesses or *per famam vicinæ* or the like (corresponding to our notion of a *qui tam* or a grand jury)? Or might it be begun by an official complaint (corresponding to our information by the attorney-general)? Or might the judge *ex officio mero* summon the accused and put him to answer, in hopes of extracting a confession which would suffice? And in the last method, must the charge at least be brought first to the judge's notice *per famam*, or *per clamorosa insinuationem*, "violent suspicion"? Such were the questions of procedure which later formed the essential subject of dispute.<sup>1</sup> The last question became in the subsequent history the most important one; and it was apparently to be answered, in the strictness of the law, in the affirmative. Nevertheless, the matter was complicated by the varieties of detail in procedure, and there were differences of phrasing in the various decretals that served as authority. It is enough here to note that the third method of trial — the *inquisitio* or proceeding *ex officio mero* — became a favorite one for heresy trials; and that its canonical lawfulness in some shape was sup-

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nificant of the new inquisitional oath procedure by the time of Boniface's English constitution, *supra*. The typical feature of that procedure, however, whether as a separate oath or as a clause in a larger oath, was the requirement *de veritate dicenda*, i. e., to answer specific interrogatories. For forms of this, see Lea, *Inquisition*, i. 399. For other forms of oath, see Burn, *Eccles. Law*, "Oaths," who is, however, not clear on the present subject. Gibson, *Codex Jur. Eccl. Angl.*, 1011, has something, but not very helpful.

<sup>1</sup> This triple classification of the preliminary procedure, — *accusatio*, *denunciatio*, *inquisitio*, — which became the foundation of later discussions (Lea, *Inquisition*, i. 310, 401; Schulte, *Kathol. Kirchenrecht*, § 100), is said to have been founded on c. 8 of the canon of the Lateran Council of Innocent III., in 1215 (Hefele, *Conciliengeschichte*, 2d ed., v. 885); and so it doubtless was. But Innocent apparently composed that canon by adopting part of the language of two of his earliest decretals, of 1199 (*Decretal.* v. 3, *de simonia*, c. 31, to the Prior of St. Victor; *ib.* v. 1, *de accus.* c. 17, to the Bishop of Versailles), and the "*tribus modis*" of the former of these appear later as the classification in v. i. *de accus.* c. 24, identical with the Lateran Council's canon. — The phrase *ex officio*, destined to become so famous in England, in connection with the third mode, seems taken from the same c. 31, *de simonia*, of 1199: "*nos frequentibus clamoris excitati, ex officio nostro volumus inquirere de præmissis*;" so again, also in 1199, *ib.* v. 32, *de purg. canon.* c. 10: "*licet contra eum nullus accusator legitimus appareret, ex officio tuo tamen, fama publica deferente, voluisti plenius inquirere veritatem.*"



ported by clear authority.<sup>1</sup> About the year 1600, there came to be much pamphleteering on this point; and a formal opinion of nine canonists declared the lawfulness of putting the accused to answer on these conditions: "*Licet nemo tenetur seipsum prodere* [i. e. accuse], *tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare.*"<sup>2</sup> Thus, on the one hand, it was easily arguable that, in ecclesiastical law, the accused could not be put to answer *ex officio mero* without some sort of witnesses or presentment or bad repute; and in this sense an oath *ex officio* (as it came to be called) might be claimed (as it was claimed) to be a distinct thing from the same oath when exacted on proper conditions, and to be therefore canonically unlawful. But, on the other hand, it is plain to see, also, how, in the headlong pursuit of heretics and schismatics under Elizabeth and James, the *ex officio* proceeding, lawful enough on Innocent III.'s conditions about *clamosa insinuatio* and *fama publica*, would degenerate into a merely unlawful process of poking about in the speculation of finding something chargeable. In short, the common abuse, in later days, of the *ex officio* proceeding led to the matter being argued, in English courts and in popular discussion, as if this oath were either wholly lawful or wholly unlawful; though, in truth, by the theory of the canon law, it *might* be either, according to the circumstances of presentment.

But (to take up again the story of Otho's and Boniface's decrees) all these distinctions, it must be clearly understood, did not trouble

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<sup>1</sup> As to the conditions precedent to an *ex officio* inquisition, lawfully putting a party to his oath, the foregoing extracts in note 1, p. 616, suggest something of the original orthodox practice; as also the following passages: ib. v. 1, *de accusationibus*, c. 21, A. D. 1212: "*inquisitio fieri debeat solummodo super illis de quibus clamores aliqui processerunt*;" ib. c. 24, A. D. 1215: "*debet inquisitionem clamosa insinuatio praevenire*;" see also ib. cc. 17, 19, 20, 23, 24; v. 34, *de purg. canon.* cc. 1, 5, 6, 10, 12, 15; *Sexti Decretal.* v. 1, *de accus. c.* 2; Lindwood, i. 109: "*a principio, ubi inquisitio sit generalis* [i. e. a roving commission, without specific accusation], *non debet exigi juramentum per quod aliquis peccatum alicujus occultum prodere cogatur; ex quo tamen crimina sine juramento corrigenda, poterit inquisitor super his exigere juramentum*;" i. 17: "*Inquisitio preparatoria fit sine exactione juramenti.*" — This much is worth noticing in detail, because it is this precise point of procedure in the canon law which led ultimately to so different a thing as our modern privilege against self-criminating testimony.

<sup>2</sup> Strype's *Life of Whitgift*, 339, App. 136 *et passim*; compare (1749) Conset's *Practice of the Spiritual Courts*, p. 384, pt. vii., cc. 1, 6; p. 100, pt. iii. c. 3, § 2. Compare this statement with Lindwood's, quoted *supra*, antedating it by several centuries. The uncertain phrasing of the later custom and law in the church is seen in Archbishop Whitgift's claim, in 1584 (Strype, 157, App. 63), when using the above formula, that if a man is "*proditus per denunciationem alterius, sive per famam*," he is bound "*seipsum ostendere ad evitandum scandalum et seipsum purgandum.*"

the lay powers in their controversy of earlier days with the church on English soil. At the time of Edward's statute *De Articulis Cleri*, in the early 1300's, the royal power is not at all concerned, in this respect, with the method of ecclesiastical procedure, but only with the limits of that jurisdiction. Otho's and Boniface's constitutions of the 1200's were issued under a new and improved procedure in the church; if the king's lawyers had thought about it at all, they would probably have welcomed the better methods, for they certainly were dissatisfied with the church's old-fashioned compurgation methods.<sup>1</sup> But the jurisdictional controversy was the vital one, as the *Articuli Cleri* show in every paragraph. Whenever the king and his councillors concede this jurisdiction, there they are found ready enough to concede to the fullest the usual ecclesiastical procedure. In this very statute, indeed, *De Articulis Cleri*, they concede the church's oath-procedure where jurisdiction is conceded, i. e. in matrimonial and testamentary causes. As time goes on and the church becomes occupied with heresy trials, the same complaisance is equally plain. Towards the end of Richard II.'s time, during the Lollard agitation, the church began, in 1382,<sup>2</sup> to receive temporal sanction for its claims in the field of heresy, and finally, in 1401,<sup>3</sup> a statute gave to the church the punishment of heretics; these were to be arrested and detained by the diocesan when "defamed or evidently suspected," until they "do canonically purge him or themselves," the diocesan to "determine that same business according to the canonical decrees." Here is no objection to the oath or to the *ex officio* procedure, but a sanction of the church's usual rule. Under this statute Archbishop Arundel, with renewed vigor, conducted his campaigns against heretics;<sup>4</sup> and under it were all subsequent prosecutions conducted for more than a century.

After a long period, however, there finally appears the little rift within the lute. In 1533, the statute of Henry IV., of 1401, was repealed,<sup>5</sup> by a statute which did not take away the church's jurisdiction over heresy, nor yet oppose its power to put the accused

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<sup>1</sup> Poll. & Mait., i. 426, giving numerous examples. These learned and distinguished authors' incidental suggestion that "very possibly the lay courts would have prevented the prelates from introducing in criminal cases any newer or more rational form of trial" is opposed to what is above advanced; yet, for lack of their reference to a plain authority, is still open to respectful dissent.

<sup>2</sup> St. 5 Rich. II. 2d sess. c. 5.

<sup>3</sup> St. 2 H. IV. c. 15. In 1414, St. 2 H. V. c. 7, another statute provided for delivering indicted heretics to the ordinary, to be tried by the church's procedure.

<sup>4</sup> Stubbs, Const. Hist., ii. 488; iii. 32, 357-365; Lindwood, i. 298.

<sup>5</sup> St. 25 H. VIII. c. 14.



on inquisitional oath, but did insist on something more than *ex officio* proceedings; it provided that "every person *presented* or *indicted* of any heresy, or *duly accused by two lawful witnesses*, may be . . . committed to the ordinary [of the church] to answer in open court." Here was the first portent of the new phase of the contest. Under the brief liberality of Edward VI., in 1547, this whole jurisdiction over heresy was taken away;<sup>1</sup> but under Mary, in 1554, the extreme statute of Henry IV. was revived.<sup>2</sup> Then, Mary's statute was in turn repealed, in 1558, by Elizabeth,<sup>3</sup> who at the same time took into her own hands the church's powers, and, with the Court of High Commission, introduced new features into the controversy.

2. *a.* Under Elizabeth and James, and to the end of the story, there appears no further doubt (material to us now) as to the jurisdiction of the ordinary church courts; it was confined, in its control of laymen, to causes "matrimonial and testamentary;" and it was constantly prohibited from holding them to answer in other classes of cases. So also the Court of High Commission in Causes Ecclesiastical,<sup>4</sup> which Elizabeth, as head of the church, now constituted, in 1558, as an extraordinary instrument for carrying out her church policy, worked under similar limitations, though it constantly strove to exceed them, and though it perhaps had jurisdiction over heresy. So, too, that offshoot of the Privy Council, known as the Court of the Star Chamber (probably first organized in 1487, but not beginning until Elizabeth's time to exercise actively its great and for some time useful powers), had by its charter so broad a jurisdiction that little dispute could be made on that score.<sup>5</sup>

*b.* Thus, the emphasis of controversy now shifted. It had in the 1300's concerned jurisdiction; it now concerned methods. The objection portended in 1533, in the statute of 25 H. VIII. c. 14 (above quoted), was now to be the vital one. The Court of High Commission of course followed ecclesiastical rules; the Court of Star Chamber did likewise, in what concerned the procedure of trial.<sup>6</sup> No one is going yet to object to their general process

<sup>1</sup> St. 1 Edw. VI. c. 12, § 3.

<sup>2</sup> St. 1-2 P. & M. c. 6.

<sup>3</sup> St. 1 Eliz. c. 1, § 15. Whether thus the statute of Henry VIII. was revived would be a question; Coke cites it as if in force: 12 Rep. 27; see the Case of the Bishops, 12 Rep. 7. It did not much matter, since Elizabeth's High Court claimed even ampler powers.

<sup>4</sup> St. 1 El. c. 1; Gneist, Const. Hist., ii. 170, 240; Coke, 4 Inst. 324, 12 Rep. 19.

<sup>5</sup> St. 3 H. VII. c. 1; Gneist, ii. 183, 245, 287; Coke, 4 Inst. 60; Stephen, Hist. Crim. Law, i. 173 ff.

<sup>6</sup> The Star Chamber Court, though its membership fluctuated, usually included the chancellor and the two chief justices; so that there was no lack of legal learning in it.

of putting the accused to answer upon oath; but there is to be much opposition to the preliminary methods, to the lack of a presentment, to charging a person *ex officio merc.* There was here some room (as we have seen) for uncertainty as to the proper canonical methods; and these courts were to strain all the possibilities, and even to exceed them.

The Court of Star Chamber seems to have raised no special antagonism during the 1500's, nor until James's time, in the next century. Nor did the Court of High Commission, under the first five commissions. But in 1583, the sixth was issued, with Archbishop Whitgift at the head, — a man of stern Christian zeal, determined to crush heresy wherever its head was raised. He proceeded immediately to examine clergymen and other suspected persons, upon oath, after the extremest *ex officio* style. From this time onwards there is much concerning this oath.<sup>1</sup> That it was canonically and statutably lawful was at least arguable.<sup>2</sup> The repealed statute of Henry VIII., c. 14, in 1533 (quoted above), which might otherwise have been urged against its methods, was now of doubtful validity.<sup>3</sup> Furthermore, the royal courts of common law, early in the agitation, had plainly declared these doings lawful on certain conditions. In 1589, the question had been first raised in the Common Pleas, in *Collier v. Collier*.<sup>4</sup> In 1591, in Dr. Hunt's

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<sup>1</sup> Hallam, *Const. Hist.*, i. 200 ff.; Neal, *History of the Puritans*, 1st ed., i. 274, 277, 281-286; Strype's *Life of Whitgift*, App. 49. Neal remarks that this was the first Commission to use the oath in *ex officio* manner.

<sup>2</sup> In 1583, certain ministers, under examination by Whitgift, had applied to Lord Burleigh to protect them; he mildly expostulated with the Archbishop, protesting that "this not a charitable way;" but the Archbishop firmly answered that "it is so cleare by law that it was never hitherto called in doubt;" and the matter ended (Neal, *History of the Puritans*, 1st ed., i. 281-286; Strype's *Whitgift*, 157, 160, App. 49, 63).

<sup>3</sup> Note 3, p. 619, *ante*.

<sup>4</sup> 4 Leon. 194; Cro. El. 201; Moor 906; charge of incontinency; according to one report, no decision was reached; by two others, the prohibition was granted. Coke was counsel for the petitioner, and cited the writs on the jurisdictional statute *de articulis cleri*, claiming that "*nemo tenetur seipsum prodere* in such cases," but only "in causes testamentary and matrimonial."

The king's judges were evidently new to the question, for in 1590, when the dissenting preacher Udall was being examined before (probably) the High Commission Court as to the authorship of the Martin Marprelate books, and refused to answer, saying, "to swear to accuse myself or others, I think you have no law for it," Anderson, J., of the King's Bench, bade Egerton, Solicitor-General (afterwards Lord Chancellor), tell Udall what the law was, and Egerton declared: "Your answers are like the seminary priests' answers, for they say there is no law to compel them to take an oath to accuse themselves;" and afterwards, when Udall again said he was not bound to answer, Anderson, J., replied, "That is true, if it concerned the loss of your life," but "you ought to answer in this case" (1 How. St. Tr. 1271, 1274). This remark of

Case,<sup>1</sup> the King's Bench refused to sustain an indictment for administering the oath on a charge of incontinency, since "the oath cannot be ministred to the party but where the offence is presented first by two men, *quod fuit concessum*; and it was said, it was so in this case." So also, in the same year, when the case of the preacher Cartwright and his followers, for refusing to take Whitgift's oath and make answer, was brought up for a final settlement, all the chief judges and law officers gave it as their opinion that the refusal was unlawful.<sup>2</sup> Up to this time, then, it would seem that the stricter ecclesiastical rule was conceded by the highest authorities to be unimpeachable by common law courts. When James I. came to the throne, in 1603, the church's claim was, if anything, strengthened; for James, in his own conceit, was as good a canonist as theologian, and would be prone to favor so useful an engine against heretics as the proceeding *ex officio*. In the first scenes of his career, he appears plainly vouching for it.<sup>3</sup> So, too, when Bancroft succeeds Whitgift as Archbishop, bringing a like zealotry to the office, the common law judges seem to have been still complaisant.<sup>4</sup>

But in 1606 Sir Edward Coke comes to be Chief Justice of the

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Anderson does not in terms fit any of the supposed rules; yet in the very next year, in Dr. Hunt's case, *infra*, he concurs in laying down the strict ecclesiastical rule; so that his views were as yet in formation.

<sup>1</sup> Cro. El. 262.

<sup>2</sup> Strype's Whitgift, 338, 360, App. 138; Neal, Puritans, 2d ed., i. 337 ff.; the officers were the two Chief Justices, the Chief Baron of the Exchequer, Sergeant Puckring, and the Attorney-General and Solicitor-General.

<sup>3</sup> Jan., 1604, Conference on Church Reformation, Neal's Puritans, 2d ed., i. 402; 2 How. St. Tr. 70, 86 (a Lord: "The proceedings in that court [of the High Commission] are like the Spanish Inquisition, wherein men are urged to subscribe more than law requireth, and by the oath *ex officio* forced to accuse themselves; " Whitgift, Archbishop of Canterbury: "Your lordship is deceived in the manner of proceeding, for if the article touch the party for life, liberty, or scandal he may refuse to answer; " Egerton, Lord Chancellor: "There is necessity and use of the oath *ex officio* in divers courts and causes; " His Majesty, James I., "here soundly described the oath *ex officio*, for the ground thereof, the wisdom of the law therein, the manner of proceeding thereby, and profitable effect of the same"). But the prelates were weakening; Whitgift, twenty years before, in his passage at arms with Burleigh (cited *supra*, note 2 p. 620), had never made the concession here recorded, or anything like it.

<sup>4</sup> 1605, Bancroft's Articuli Cleri, and the Judges' Answer, 2 How. St. Tr. 131, 155 (*Objection* [by the clergy, that the Judges issue a prohibition to the clergy on the ground] "that the party ought to have a copy of the articles being called in question *ex officio*, before he should answer them; " *Answer* [by the Judges]: "Yet ought they to have the cause made knowne unto them, for which they are called *ex officio*, before they are examined, to the end that it may appeare unto them, before their examination, whether the cause be of ecclesiasticall cognizance; otherwise they ought not to examine them upon oath").

Common Pleas, and a change begins gradually. Coke had been counsel for Collier in 1589,<sup>1</sup> and had perhaps thus acquired his convictions. It is well known that he set himself, as judge, against the ecclesiastical courts' pretensions in general. At first, however, he avoided a direct issue on the *ex officio* oath. His first case, in 1609, he decided on other points.<sup>2</sup> His next, in 1615, was allowed to drag on for a year or more, with repeated adjournments and other expedients intended to induce either the accused or the High Court of Commission to yield a point and avoid the direct issue.<sup>3</sup> The plain opinion of Coke, and, apparently, the final decision of the court, was that the oath was improperly put by the ecclesiastical court; yet the objectionable thing seemed to be, not that the accused should be compelled to answer, but that he should be charged *ex officio*, in a cause not testamentary or matrimonial but penal.<sup>4</sup> In the mean time (in 1610, 1611, and 1615), three other cases had come before the common law courts, presumably the King's Bench, and from their imperfect reports it may be inferred that a similar view was now prevailing there.<sup>5</sup> The change had thus substantially been effected.<sup>6</sup> Archbishop Abbot, a man

<sup>1</sup> *Ante*, note 4, p. 620.

<sup>2</sup> 1609, Edwards' Case, 13 Rep. 9 (Coke, C. J., and three others; prohibition granted against the High Court of Ecclesiastical Causes, in putting Edwards to his oath, on a charge of libel, as to his meaning in the words uttered; resolved on three grounds, first, the matter was temporal, not ecclesiastical; secondly, it was not for this special court; thirdly, "in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intention or thought of his heart; and if any man should be examined upon his oath what opinion he holdeth concerning any point of religion, he is not bound to answer the same;" nothing was mentioned by party or judges, as to a privilege against matter involving a penalty, nor is the *ex officio* oath declared unlawful).

<sup>3</sup> Dighton v. Holt, 3 Bulstr. 48; briefly reported in Moor 840; 2 Cro. 388; 1 Rolle 337; Jura Eccles. 355, 9.

<sup>4</sup> In 12 Rep. 26, "Oath Ex Officio," is given by Coke an opinion, said by him to have been rendered by himself, as Chief Justice, as early as 1607, to the Commons, on their request; in this he plainly declares that in the ecclesiastical courts "no layman may be examined *ex officio*, except in two causes," matrimonial and testamentary. But the above date is doubtful; the volume was not printed until after his death, and its authority is not of the best.

<sup>5</sup> 1610, Mansfield's Case, Rolle's Abr. "Prohibition," (T) 4 (a clergyman was allowed to be examined on oath for preaching heresy); 1611, Clifford v. Huntly, ib. (T) 6, Jura Eccles. 427, 7 (a woman was not allowed to be examined as to a forfeiture); Huntley v. Cage, 2 Brownl. 14 (apparently the same case); 1615, Bradston's Case, Rolle's Abr. "Prohibition," (T) 1; Jura Eccles. 355, 9 (a layman was not bound to answer as to an offence involving forfeiture). All these, of course, are cases of prohibitions issuing to the ecclesiastical court.

<sup>6</sup> In Spendlow v. Smith, Hob. 84, Jura Eccles. 428, probably, late in 1615, a plain ruling was made; in a suit in the church court for dilapidation, charging a lease for

of less rabid views, had in 1610 succeeded Bancroft;<sup>1</sup> Coke had carried his views to the King's Bench, as Chief Justice, in 1613; and the matter seems to have been so far settled (in respect to the ecclesiastical claims) that no further case occurred,<sup>2</sup> until in 1640, the statute (quoted later) put an end, for the time, to further doubt.

But the Star Chamber claims remained still to be faced. What had been settled was (in effect) merely that the ecclesiastical courts (including that of High Commission) could not, as a matter of jurisdiction and procedure, put laymen to answer, *ex officio*, to penal charges. But this did not touch the Court of Star Chamber. Its conceded jurisdiction was ample enough to fine and imprison for almost any offence that it chose to pursue.<sup>3</sup> The very statute that organized it, in 1487, expressly vested in it the authority to examine the accused on oath in criminal cases, without naming even such restrictions as the ecclesiastical law conceded;<sup>4</sup> and its right to examine in this fashion, wherever the case was within its jurisdiction, seems to have been conceded under Henry VIII. and Elizabeth, all through the 1500's.<sup>5</sup> But as James's reign went on, and its practices became arrogant and obnoxious, so its use of the *ex officio* oath came to share the burden of criticism and discontent which that procedure in the ecclesiastical courts excited. The common-law courts seem to have found no handle against its oath-procedure, even after Coke's accession to the bench.<sup>6</sup> But though

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years and fraud, the defendant was put to his oath as to the fraud; this was held unlawful, "for though the original cause belong to their cognizance, yet the covin and fraud is criminal, and . . . punishable both in the Star Chamber and by the penal laws of fraudulent gifts, and not to be extorted out of himself by his oath."

<sup>1</sup> Neal, Puritans, i. 450.

<sup>2</sup> Except Jenner's Case, in 1621 (Jura Eccles. 427, 6; Rolle's Abr. "Prohibition," (T) 5; briefly reported, in accord with Edwards' Case, *supra*), and Latters v. Sussex, undated, but before 1616 (Noy 151).

<sup>3</sup> *Ante*, note 5, p. 619.

<sup>4</sup> St. 3 H. VII. c. 1.

<sup>5</sup> 1589, Rither's Case, Cro. El. 148, *semble*; 1591, Buckley v. Wood, Cro. El. 248.

<sup>6</sup> In the following two cases, Coke himself, at the very time when he was opposing from the bench (as already observed) the *ex officio* oath of the High Commission Court, appears as a consenting party to the enforcement of the even looser practice of the Court of Star Chamber:

1610, Andrew v. Ledsam, 2 Brownl. 49 (A. exhibited his bill in the Star Chamber against L., a broker, for defrauding him by forging deeds to represent the investments made by him with A.'s money; "L. had forged and counterfeited them, as he hath confessed upon his examination, upon interrogatories administered by the plaintiff in this court"; the only question was whether, among his punishments, he should lose one ear or both; "and these doubts were resolved by Coke, Chief Justice of the

there was no explicit judicial condemnation, there was, after a time, more than one formal questioning of it.<sup>1</sup> The analogy of the doctrine already settled by Coke in 1607-1616, for the ecclesiastical courts, was naturally invoked. Towards the end of its career, it would seem that some impression was being made on the court's own theory of orthodoxy.<sup>2</sup>

3. But its time in the kingdom was now drawing to an end; and the trial which seems to have precipitated the crisis came in 1637, — a case full of instruction for our present history. John Lilburn, an obstreperous and forward opponent of the Stuarts (popularly known as "Freeborn John"), constituted somewhere between a patriot and a demagogue, had the obstinacy to force the issue. A decade later, he came into a similar collision with the Parliament's government; but he makes his entrance as a victim of the King's Star Chamber: —

1637-1645, *Lilburn's Trial*, 3 How. St. Tr. 1315 ff.; John Lilburn was

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Common Bench, — where they were moved, — and Fleming, Chief Justice of the King's Bench, that L. should lose but one ear");

1613, Countess of Shrewsbury's Case, 12 Co. 94, 2 How. St. Tr. 769 (before a council, including the Chancellor, the two Chief Justices, Coke being one, and the Chief Baron, probably the Star Chamber in substance; the Countess of Shrewsbury, being brought before the Council and "required to declare her knowledge" as to the escape of Lady Arabella Stuart, which the Countess was said to have abetted, declined to answer, first, because she had made a vow to God to keep the matter secret, and next, because she was privileged as a peer not to testify, except before her peers; both these claims were totally repudiated, and she was adjudged in high contempt; nothing was said, by either the party or the judges, of the procedure or the present privilege; yet it was certainly involved, if it had existed).

<sup>1</sup> 1629, Stroud's Trial, 3 How. St. Tr. 235, 237; Cobbett's Parl. Hist., ii. 504, 526 (certain members, including Hollis, Eliot, and others, having been arrested and examined by the king's order, and having refused "to answer out of parliament what was said and done in parliament" concerning treasonable utterances, the judges, being asked whether this refusal was not a high contempt, answered all "that it is an offence, punishable as aforesaid, so that this do not concern himself but another, nor draw him to danger of treason or contempt by his answer;" this was an equivocal utterance); 1644, Archbishop Laud's Trial, 4 id. 315, 385, 397 (being charged with unlawfully tendering the oath *ex officio*, some years before, he answers that "that was the usual proceeding in that court [i. e., Council of the Star Chamber];" it was "then the common, and for ought I yet know, then the legal course of that court").

<sup>2</sup> *Ante* 1635, Hudson, Treatise of the Court of Star Chamber, in Hargr., Collect. Jurid., i. 209 ("But the great question hath been, whether a witness which in examination will not give any answer shall be compelled to make answer to the interrogatories. . . . Therefore, if a witness conceive that the answering of a question may prejudice himself, it seemeth that he need not to answer; for he is produced to testify betwixt others, and not to prejudice himself"); 208 ("neither must it question the party to accuse him of a crime, for it is an high contempt to make the justice of this court an instrument of malice"). But Lilburn's case, *post*, shows plainly that the practice was very different from Hudson's exposition.



committed to prison by the Council of the Star Chamber, including the Chief Justice of the King's Bench, on a charge of printing or importing certain heretical and seditious books; on examination, while under arrest, by the Attorney-General, having denied these charges, he was further asked as to other like charges, but refused, saying: "I am not willing to answer you to any more of these questions, because I see you go about by this examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more; . . . and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence and not answer to your interrogatories." Afterwards, "some of the clerks began to reason with me, and told me every one took that oath, and would I be wiser than all other men? I told them, it made no matter to me what other men do." Then, when examined before the Chamber itself, he again refused, saying, "I had fully answered all things that belonged to me to answer unto," but as to things "concerning other men, to insnare me, and get further matter against me," he was not bound "to answer such things as do not belong unto me; and withal I perceived the oath to be an oath of inquiry," i. e. *ex officio*, "and of the same nature as the High Commission oath," which was against the law of the land, the Petition of Right, and the law of God as shown in Christ's and Paul's trials; yet, "if I had been proceeded against by a bill, I would have answered." Then the Council condemned him to be whipped and pilloried, for his "boldness in refusing to take a legal oath," without which many offences might go "undiscovered and unpunished;" and in April, 1638, 13 Car. I., the sentence was executed. On Nov. 3, 1640, he preferred a complaint to Parliament, and on May 4, 1641, the Commons (having not yet abolished the Star Chamber Court) voted that the sentence was "illegal and against the liberty of the subject," and ordered reparation. But, the petition going for a while no further, he applied once more, and on Feb. 13, 1645 (1646), the House of Lords heard his petition by counsel, Mr. Bradshaw urging for him the sentence's illegality, "the ground whereof being that Mr. Lilburn refused to take an oath to answer all such questions as should be demanded of him, it being contrary to the laws of God, nature, and the kingdom, for any man to be his own accuser;" and Mr. Cook arguing that, without an information, "to administer an oath was all one with the High Commission," whereon the Lords ordered that the said sentence "be totally vacated . . . as illegal, and most unjust, against the liberty of the subject and law of the land and Magna Charta;" and on Dec. 21, 1648, he was finally granted £3000 in reparation.

Lilburn's case, together with those of Prynne and Leighton (whose grievances were of another sort), were sufficiently notorious

to focus the attention of London and the whole country. The Long Parliament (after eleven years of no Parliament) met on Nov. 3, 1640. Lilburn was on the spot that day with his petition for redress. In March, 1641, a bill was introduced to abolish the Court of Star Chamber, as well as (then or shortly after) a bill to abolish the Court of High Commission for Ecclesiastical Causes.<sup>1</sup> These were both passed July 2-5 of the same year;<sup>2</sup> and in the latter statute was inserted a clause which forever forbade, for any ecclesiastical court, the administration *ex officio* of any oath requiring answer as to matters penal.<sup>3</sup> This clause was in substance reenacted as soon as the Restoration of the Stuarts was effected.<sup>4</sup>

But was the oath hereby *totally* abolished in ecclesiastical courts, — that is, was it the *ex officio* proceeding only that was abolished, and could a man still be put to answer in a penal matter, in a cause lying within the court's jurisdiction and begun by proper canonical presentment? This question fairly remained open under the first statute, though less plausibly under the second one. During the next fifteen years after the enactment of the second statute, the matter came often before the courts, in applications for prohibitions. The various rulings are hardly to be reconciled.<sup>5</sup> But, by

<sup>1</sup> Cobbett, Parliamentary History, ii. 722, 762, 853.

<sup>2</sup> St. 16 Car. I. cc. 10, 11.

<sup>3</sup> 1641, St. 16 Car. I. c. 11, § 4 (no person "exercising spiritual or ecclesiastical power, authority, or jurisdiction," shall "*ex officio*, or at the instance or promotion of any other whatsoever, urge, enforce, tender, give, or minister" to any person "any corporal oath, whereby he or they shall or may be charged or obliged to make any presentment of any crime or offence, or to confess or to accuse himself or herself of any crime or offence, delinquency, or misdemeanor, or any neglect, matter, or thing, whereby or by reason whereof he or she shall or may be liable or exposed to any censure, pain, penalty, or punishment whatsoever").

<sup>4</sup> 1661, St. 13 Car. II. c. 12, § 4 (no person "having or exercising spiritual or ecclesiastical jurisdiction" shall tender to any person "the oath usually called the oath *ex officio* or any other oath," etc., in effect as in the prior statute).

<sup>5</sup> 1665, *R. v. Lake*, Hardr. 364, 388 (prohibition against exacting an oath on articles apparently involving a criminal charge; apparently granted, but upon another point); 1665, *Scurr v. Burrell*, 1 Sid. 232 (prohibition against a charge of exacting the oath in *ex officio* proceedings for sitting in church with the hat on; adjourned, and apparently not decided); 1669, *Goulson v. Wainwright*, 1 Sid. 374 (prohibition granted against exacting an oath on *ex officio* articles for "matters which are criminal"); 1669, *Taylor v. Archbishop of York*, 2 Keb. 352 (prohibition lies against exacting the oath in criminal charges); 1671, *Grove v. Elliot*, 2 Ventr. 41 (prohibition against exacting oath on charge of keeping conventicles, etc.; argued that "no man ought to be proceeded against without due presentment;" held, that it did not appear to be a proceeding "merely *ex officio*," and due presentment must be presumed, and hence the prohibition was refused); 1680, *Farmer v. Brown*, 2 Lev. 247, *T. Jones* 122; s. c. *Heme v. Brown*, 1 Ventr. 339 (prohibition against requiring an answer to a charge of not paying a church tax; apparently treated as a civil case, and not within the statute's pro-



the end of the 1600's, professional opinion apparently settled against the exaction of an answer under any form of procedure, in matters of criminality or forfeiture. Such, at any rate, beginning with the 1700's, was the application of the law ever after, without question.<sup>1</sup> The statutes had abolished, for those courts, all obligation to answer on oath to such matters, without regard to the form of presentment or accusation.

II. But what, in the mean time, of the common law? Thus far the controversy here examined has been purely one of ecclesiastical jurisdiction and ecclesiastical methods of presentment. The common law courts have concerned themselves with it simply by virtue of their superior authority to keep the church courts and other courts to their proper boundaries. In their enforcement of these restrictions, one thing seems plain: There is no feature of objection to the compulsion, in itself, of answering on oath; the objection is as to *who* shall require it, and *how* it shall be required. On the very eve of the statute of 16 Car. I., and of the disappearance of the Star Chamber forever, John Lilburn, the stoutest of recusants, is willing to answer all matters properly charged against him, and objects only to, "such things as do not belong unto me." He seems to have known no broader defensive principle to fall back upon, more substantial or inclusive than a conceded rule of ecclesiastical procedure. Was there in fact, at the time, any available principle known in the common law courts in jury trials?

I. Down to the early 1600's, at any rate, it was certainly lacking. If we look at what the common law had to build upon, before then, there is nothing of the sort. The generations which forced an accused to the ordeal and the compurgation oath had plainly no scruple against such compulsion. Compurgation, under its later name of "wager of law," was enforced in the 1500's without objection. Jury trial came to be approved as a trial so much more

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hibition; after a division of the court and adjournment, the prohibition was refused unanimously).

<sup>1</sup> 1750, L. C. Hardwicke, in *Brownsword v. Edwards*, 2 Ves. Sr. 243, 245 (refusing to compel discovery of an incestuous marriage punishable in the ecclesiastical court: "I am afraid, if the court should overrule such a plea, it would be setting up the oath *ex officio*, which then the Parliament in the time of Charles I. would in vain have taken away, if the party might come into this court for it"); and in 1752, *Finch v. Finch*, ib. 491, 493 ("as to the first objection to it, that it will subject him to ecclesiastical censures and that the court will not compel him to answer on oath, which is like an oath *ex officio*, that is true"); 1822, *Schultes v. Hodgson*, 1 Add. 105, (prosecution for adultery, etc.; "this is a criminal suit;" and none of the articles were required to be answered).

effective that the defendant's oath in wager of law became, indeed, rather a privilege than a burden.<sup>1</sup> In jury trial, to be sure, the oath was not administered to the defendant, because it would, in those days, still be regarded as a decisive thing,<sup>2</sup> and as a peremptory method of self-exoneration which would be entirely too easy; it was the jurors' oaths that were to "try" him, not his own; and so, in jury trial proper, either in civil or in criminal cases, the oath of the party does not appear. But wherever, in other proceedings, it was thought appropriate to have the defendant's oath, there was no hesitation in requiring it. All through the 1500's the statute-book records the sanction of oaths to accused persons. The Star Chamber statute of 1487 (3 H. VII. c. 1) had expressly sanctioned the examination of the accused on oath at the trial, because "little or nothing may be found by inquiry" of the ordinary sort. The statute of H. VIII., in 1533, authorized the common law officers to turn over indicted heretics for examination by the ordinaries upon oath.<sup>3</sup> Wherever a party is committed to jail by the judges for fraud or other misconduct done in the course of trial, by forging writs or the like, he appears to have been put to his examination on oath to disclose it.<sup>4</sup> Persons charged as bankrupts,<sup>5</sup> as Jesuits,<sup>6</sup> as abusers of warrants,<sup>7</sup> were to be examined on oath by common law officers. Most notably, every accused felon was required to be examined by the justices of the peace, and his examination to be preserved for the judges at the trial;<sup>8</sup> and,

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<sup>1</sup> Thayer, *Prelim. Treatise*, 29.

<sup>2</sup> "All such persons to be tried by their oaths," is a phrase of 1543 in the Court of Requests: *Seld. Soc. Publ. XII*, lxxxv. See "Required Numbers of Witnesses," 15 *HARV. L. REV.* 83.

<sup>3</sup> *Ante*, p. 619.

<sup>4</sup> 1565, *Whiteacres v. Thurland*, Dyer 242 a; *Dawbeny v. Davie*, ib. 244 a; *Thurland's Case*, ib. 244 b.

<sup>5</sup> 1570, St. 13 Eliz. c. 7, § 5.

<sup>6</sup> 1593, St. 35 Eliz. c. 2, § 11 (any person suspected to be a Jesuit, etc., who "being examined by any person having lawful authority . . . shall refuse to answer directly and truly whether he be a Jesuit" shall be committed "until he shall make direct and true answer to the said questions").

<sup>7</sup> 1601, St. 43 Eliz. c. 6, § 1 (persons charged with abuse of warrants are to be sent for by the judges "and be examined thereof upon their oaths," and if the offence be confessed by them or otherwise proved, they are to be committed to jail).

<sup>8</sup> 1553, St. 1 & 2 P. & Mar. c. 13, § 4; 1555, St. 2 & 3 P. & Mar. c. 10 (inasmuch as the preceding statute did not extend to cases where the prisoner was not bailed, "in which case the examination of such prisoner, and of such as bring him, is as necessary, or rather more, than where such prisoner shall be let to bail," so it is extended to the latter case also); the defendant was here not put on oath, though the witnesses were, but the reason for this was merely as before, that the oath was thought to give to the accused's statements a solemnity and weight which would be too great an advantage.

so far as appears, not a murmur was ever heard against this process till the middle of the 1700's ;<sup>1</sup> and no statutory measure was taken to caution the accused that his answer was not compellable, until well on in the 1800's.<sup>2</sup> The every-day procedure in the trials of the 1500's and the 1600's, and almost the first step in the trial, was to read to the jury this compulsory examination of the accused ; in 1638, the year after Lilburn's imprisonment, in the very next recorded trial, the accused's previous examination before the Chief Justice was offered and read at the outset, without a shadow of objection.<sup>3</sup> Furthermore, as the trial goes on, the accused, in all this period of 1500-1620, is questioned freely and urged by the judges to answer ; he is not allowed to swear, for the reasons already noted, but he is pressed and bullied to answer.<sup>4</sup> A striking example is found in the jury trial of Udall, in 1590, for seditious libel ; and the significant circumstance is that Udall, who before the ecclesiastical High Commission Court, a few months previous,<sup>5</sup> had plainly based his refusal on the illegality of making a man accuse himself by inquisition, has here, before a common law jury with witnesses charging him, no such claim to make : —

1590, *Udall's Trial*, 1 How. St. Tr. 1271, 1275, 1289 : Udall pleaded not guilty ; and after argument made and witnesses testifying, Judge *Clarke* : "What say you ? Did you make the book, Udall, yes or no ? What say you to it, will you be sworn ? Will you take your oath that you made it not ?" declaring this to be a favor ; Udall refused, and the judge finally asks : "Will you but say upon your honesty that you made it not ?" Udall again refused ; Judge *Clarke* : "You of the jury consider this. This argueth that, if he were not guilty, he would clear himself ;" then, to Udall : "Do not stand in it ; but confess it !"

The same features appear still in 1606, in the Jesuit Garnet's trial for the Gunpowder Plot ; called before the Council inquisitorially, he denies his liability to answer ;<sup>6</sup> but, tried on indictment

<sup>1</sup> Greenleaf, *Evidence*, 16th ed., App. III.

<sup>2</sup> *Ib.*

<sup>3</sup> 3 How. St. Tr. 1369, 1373.

<sup>4</sup> 1554, *Throckmorton's Trial*, 1 How. St. Tr. 862, 873 ; 1571, *Duke of Norfolk's Trial*, *ib.* 958, 972 ("then being ruled over by the Lord High Steward that he should answer directly to that question, he answered") ; 1588, *Knightley's Trial*, *ib.* 1263, 1267. Mr. Justice Stephen's summary of the proceedings at this period is in agreement with what is above said : *Hist. Crim. Law*, i. 325 ; so also, for 1565, *Smith, Com. of England*, ii. c. 26, quoted in *Thayer, Prelim. Treatise*, 157.

<sup>5</sup> *Ante*, p. 620, note 4.

<sup>6</sup> 1606, *Garnet's Trial*, 2 How. St. Tr. 218, 244 (Garnet : "When one is asked a question before a magistrate, he is not bound to answer before some witnesses be produced against him, '*quia nemo tenetur prodere seipsum*'") ; note that this is a reference to the ecclesiastical rule of presentment, as already examined, not a refusal to answer at all events.

before a common law jury and the chief common law judges, he is questioned and urged, he answers or refuses to answer, as it suits him, but says never a word of the illegality of such questions or an immunity from answer.<sup>1</sup> And such indeed, beyond a reasonable doubt, was the common law, as well as the common practice, of the time.

It is true that precedents apparently to the contrary have been alleged to exist, by Coke, for example, who invokes two common law cases to support his ambiguous and shifting arguments. But neither these, nor any others hinted at, indicate in any way the existence of any common law rule.<sup>2</sup> Even Coke himself, whose writings have since served as the chief source of information on this subject, actually does not go so far as to apply his arguments to any effect but the limitation of the ecclesiastical courts' proceedings.<sup>3</sup> He is willing to stop them from requiring answers "which may be an evidence against him at the common law upon

<sup>1</sup> *Ib. passim.*

<sup>2</sup> *Hinde's Case*, 1558, Dyer 175 *b*; cited by Coke (12 Rep. 27; 3 Bulstr. 49) to show that a person need not answer in the church court questions that bring him in danger of a penal law. *Hinde's case* in fact was this: The king had appointed a commission to examine the title of Skrogs, a justice's clerk, to his office, with power to commit him if he refused to answer; he refused, demurring to the jurisdiction, and was committed; then he was released on *habeas corpus* by the judges of the Common Pleas, because "he was a person of the court, and a necessarie member of it;" and the reporter adds: "*Simile*, M. 18, by Hind, who would not take an oath before the ecclesiastical judges for usury."

Leigh's case, 1568, is cited by Coke (*ubi supra*) as that of an attorney committed by the High Court for refusing to swear as to attendance at mass, and delivered on *habeas corpus* by the Common Pleas, because "they ought not in such case to examine upon his oath." There is nothing to show that this was not an application of the ordinary ecclesiastical rule, examined *supra*. In *Anon.*, 2 Brownl. 271 (1609), occurs a case similar to Skrogs'.

In *Attorney-General v. Mico*, cited *post*, other alleged precedents, unreported and scantily mentioned, were bandied back and forth by counsel; but there is nothing to show that they really involved the present question.

<sup>3</sup> In 4 Inst. 60, 324, on the Star Chamber and High Commission Courts, he says nothing of the oath. In 2 Inst. 657, and 12 Rep. 26, he has much against the oath, but substantially upon the ground of jurisdiction alone. In *Dighton v. Holt* (cited *ante*, p. 622), he advances frequently the argument *nemo tenetur* (he had first used it in *Collier v. Collier*, cited *ante*, p. 620); but this was an invocation of the canon law rule taken from the canon lawyers. In *Edwards's Case* (cited *ante*, p. 622), he is concerned chiefly with the jurisdiction, and does not even criticise the *ex officio* oath as such, though in his opinion in 12 Rep. 26, said by him to have been solemnly given two years before, he attacks the oath with great plainness. No two of his various expositions coincide in argument; to reconcile all of his passages is impossible. Add to this his inconsistent attitude in the cases of *Andrew v. Ledsam* and the *Countess of Shrewsbury*, cited *ante*, p. 623.

the penal statute ;" but he says nothing about a common law illegality ; indeed, this argument of his seems rather to assume the contrary. He freely quotes, in mutilated form, the canon law phrase (whose origin has been examined above) "*nemo tenetur seipsum prodere* ;" but there is nothing to show, down to the end of his life, that he believed in or knew of any privilege of refusal in the king's common law proceedings.

The only source of doubt that can be found arises from certain scantily reported chancery rulings of the late 1500's. Some of these, at first sight, might be supposed to indicate the existence, as early as Elizabeth's reign, of a general privilege against self-crimination. Other explanations, however, lie open with fair plainness. In the first place, it is a long-established maxim of jurisdiction that equity will not lend its aid, even by relief, apart from discovery, to enforce a forfeiture ; on this ground (and remembering that an "answer" in chancery is a pleading as well as testimony) are explainable the cases refusing to compel an answer as to a forfeiture.<sup>1</sup> In the next place, the chancellor had almost no jurisdiction over criminal charges ;<sup>2</sup> hence, in cases of this nature, cognizance might be declined, by refusing to compel an answer.<sup>3</sup> But, where this jurisdiction was not disputable, there seems to have been no objection to compelling the answer.<sup>4</sup> Finally, the chancery practice is to be interpreted by the rule of the ecclesiastical courts, already examined. The chancellor was forming his procedure (hardly organized until Bacon's time, in the early

<sup>1</sup> Such are the following cases : 1587, 1598, *Cromer v. Penston*, Cary 13 (bill against the survivor of a joint tenancy, suggesting a secret severance during lifetime ; "the Lord Keeper overruled, that the defendant should not answer," — whatever this may mean) ; 1595, *Wolgrave v. Coe*, Toth. 18 (bill against one covenanting to deliver deeds ; "the opinion of the court was, the defendant needed not to answer, because he should thereby disclose cause of forfeiture of the bond") ; 1600, Toth. 7 ("Mildmay was not enforced by answer to the bill of Cary and Cottington, to discover a forfeiture to his own hurt") ; see also Toth. 10.

<sup>2</sup> 1585, *Wakeman v. Smith*, Toth. 12 ("although criminal causes are not here to be tried directly for the punishing of them, yet incidently for so much as concerneth the equity of the cause, they are to be answered").

<sup>3</sup> This perhaps explains the following case, undated, but probably before 1600 : *Vice-Countess Montague's Case*, Cary 12 (eloignement of a ward ; upon a bill of discovery brought, "it seemed," as to the defendants, "they should not answer to charge themselves criminally, especially in this case, where so great a punishment as abjuration may follow").

<sup>4</sup> 1570, *Anon.*, Dyer 288 a (examination on oath in chancery to answer a charge of perjury ; held, by C. P., to be allowable if the Chancery Court had jurisdiction over perjury) ; 1631, *Winn v. Swayne*, Toth. 12 ("a commission to answer bribery and corruption").

1600's) almost precisely after that of the ecclesiastical courts.<sup>1</sup> So far as he could take cognizance at all of a case involving a criminal fact, he would of course employ this ecclesiastical rule, as he did others, and not require the defendant to answer without due accusation by two witnesses or by presentment; that is to say, a plaintiff, upon his unsworn bill alone, could not put the defendant to answer to a criminal fact. The close affinity between the chancellor's and the church's courts makes it plain that we need not look to the former for light upon the common law notions of the time — especially when that practice stands out plainly in the full and abundant reports throughout this whole period.

2. For nearly a generation onwards, in the 1600's, there is no acknowledgment of any privilege in common-law trials. Under Coke's leadership, from 1607 to 1616, the ecclesiastical courts had been kept within bounds; but there were as yet no bounds in common law proceedings. With 1620 begin indications that some impression was being transferred into that department.<sup>2</sup> Nevertheless, in the parliamentary remonstrances to Charles I., and the discussion over ship-money and forced loans and the Petition of Right, in the parliament which ended in 1629, there is nothing about such a privilege.<sup>3</sup>

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<sup>1</sup> "Equity followed the ecclesiastical courts almost literally in its mode of taking the testimony of witnesses and requiring each party to submit to an examination under oath by his adversary": Langdell, *Equity Pleading*, § 47.

<sup>2</sup> 1620, Sir G. Mompesson's Trial, 2 How. St. Tr. 1119, 1123 (the Lords' Committee reported "that they had examined many witnesses, . . . that the Lords' Committee urged none to accuse himself;" but their proceedings were probably inquisitorial, and came rather under the ecclesiastical rule); 1631, Fitzpatrick's Trial, 3 How. St. Tr. 419, 420 (Fitzpatrick had testified, at Lord Audley's trial, to a rape committed by F. at A.'s instigation; at F.'s own trial, he then protested against the use of his former testimony, since "neither the laws of the kingdom required nor was he bound to be the destruction of himself;" and Chief Justice Hyde replied, "it was true, the law did not oblige any man to be his own accuser," yet here the testimony could be used).

<sup>3</sup> The suggestion by Lilburn's counsel, in 1637 (3 How. St. Tr. 1356), that the *ex officio* oath was "directly contrary to the Petition of Right in 3 Car.," referred apparently to Par. iii. and x. of the Petition of Right of 1628 (3 How. St. Tr. 222; *infra*), which protested against being "called to make answer or take such oath." This, perhaps, referred to a political promissory oath of conformity or obedience in connection with the refusal to pay ship-money, — an entirely different thing. On the other hand, however, it may have referred to a really inquisitorial oath. The circumstances were these: Darnel, E. Hampden, and others, in 1627, on being required to make a loan to the king, and being examined to disclose their estates, declined to pay or to disclose, and applied for release under a *habeas corpus*, which was refused by the judges (3 How. St. Tr. 1); on which the Petition of Right was passed: 1628, 3 Car. I., c. 1, §§ 3, 10 (after reciting that persons refusing to make loans to the king "have had an oath administered unto them not warrantable by the laws or statutes of this realm," Parliament petitions "that none be called to make answer or take such oath," or be confined "for refusal thereof;" and the king accords the petition).



3. Finally, however, in 1637-41, comes Lilburn's notorious agitation;<sup>1</sup> and in 1641, with a rush, the Courts of Star Chamber and of High Commission are abolished, and the *ex officio* oath to answer criminal charges is swept away with them.<sup>2</sup> With all this stir and emotion, a decided effect is produced, and is immediately communicated, naturally enough, to the common law courts. Up to the last moment, Lilburn had never claimed the right to refuse absolutely to answer a criminating question; he had merely claimed a proper proceeding of presentment or accusation.<sup>3</sup> But now this once vital distinction comes to be ignored. It begins to be claimed, flatly, that no man is bound to incriminate himself, on any charge (no matter how properly instituted), or in any court (not merely in the ecclesiastical or Star Chamber tribunals).<sup>4</sup> Then this claim comes to be conceded by the judges,—first in criminal trials, and even on occasions of great partisan excitement;<sup>5</sup> and afterwards, in the Protector's time, in civil cases, though not without ambiguity and hesitation.<sup>6</sup> By the end of Charles II.'s reign, under the Restoration, there is no longer any doubt, in any court;<sup>7</sup> and by this period, the extension of the privilege to in-

<sup>1</sup> *Ante*, p. 625.

<sup>2</sup> *Ante*, p. 626.

<sup>3</sup> *Ante*, p. 625.

<sup>4</sup> 1641, Twelve Bishops' Trial, 4 How. St. Tr. 63, 75 (on being asked whether they had subscribed the treasonable petition, they refused to answer, because they were not "bound to accuse themselves").

<sup>5</sup> 1649, King Charles's Trial, 4 How. St. Tr. 993, 1101 (one Holden objected to answering, and the court, "perceiving that the questions intended to be asked him tended to accuse himself, thought fit to waive his examination"); 1649, Lilburn's Trial, *ib.* 1269, 1280, 1292, 1342 (Lilburn, on a trial under the Commonwealth for treason, claimed that his former counsel, Bradshaw, now Lord President of the Council, had tried to make him criminate himself just as the Star Chamber Court had formerly done; he here refused on his trial to do so; Lord *Keble*: "You shall not be compelled;" *Lilburn*: "I am upon Christ's terms, when Pilate asked him whether he was the Son of God, and adjured him to tell him whether he was or no; he replied, 'Thou sayest it.' So say I: *Thou*, Mr. Prideaux, sayest it, they are my books. But prove it;" Judge *Jermin*: "But Christ said afterwards, 'I *am* the Son of God.' Confess, Mr. Lilburn, and give glory to God;" see also p. 1445).

<sup>6</sup> 1655, *The Protector v. Lord Lumley*, Hardr. 22 (Exchequer; bill to discover defendant's estate, "for that he was outlawed whereby his goods and the profits of his lands were forfeited; the defendants demurred, *quia nemo tenetur prodere seipsum*," is overruled, because "the outlawry is in the nature of a gift to the king or a judgment for him;" thus the general principle is apparently assumed valid; though, as already noted *ante*, p. 631, the equitable rule against aiding a forfeiture may have been the reason); 1658, *Attorney-General v. Mico*, Hardr. 139, 145 (Exchequer; bill for relief and discovery, for evading customs laws and attempting to bribe; demurrer, that the bill contained charges involving penalties and forfeitures; the defendant evidently cites most of his authorities from Coke's works, which had now been published; there was no decision; nor yet in case of *Att'y-Gen'l v. —*, *ib.* 201, in 1662, probably the same case).

<sup>7</sup> 1660, *Scroop's Trial*, 5 How. St. Tr. 1034, 1039 (L. C. B. Bridgman: "You are

clude an ordinary witness, and not merely the party charged, is for the first time made.<sup>1</sup> It is interesting to note, in passing, that the privilege, thus established, comes into full recognition under the judges of the restored Stuarts, and not under the parliamentary reformers.

Nevertheless, the novelty and recentness of it all in common law proceedings is apparent, not only in the doubts which the Court of Exchequer, in 1658, so long entertained, and in the gradual progress of the recognition in criminal trials after 1641, but also in the fact that it remained an unknown doctrine for this whole generation in the colony of Massachusetts, — a colony not only familiar enough with common legal proceedings, but knowing enough to send over for Sir Edward Coke's reports and other law books to inform its court and keep abreast of the times; in this colony the privilege which began its career after the departure of its founders from England was unrecognized till at least as late as

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not bound to answer me, but if you will not, we must prove it"); 1662, Crook's Trial, 6 id. 201, 205 (the defendant, refusing to take the oath of allegiance, claimed that he ought not to accuse himself, for "*nemo debet seipsum prodere*"); 1670, Penn's and Mead's Trial, ib. 951, 957 (on a question being put to Mead, he refused to answer; "It is a maxim in your own law, '*Nemo tenetur accusare seipsum*,' which, if it be not true Latin, I am sure it is true English, 'that no man is bound to accuse himself'"); 1673, Penrice v. Parker, Finch 75 (bill for counsel's fees; demurrer allowed, that an answer would "draw him under a penal law"); 1676, Jenkes' Trial, 6 How. St. Tr. 1189, 1194 (defendant: "I desire to be excused all farther answer to such questions, since the law doth provide that no man be put to answer to his own prejudice;" and no further questions were put); 1679, Reading's Trial, 7 id. 259, 296 (Oates, for the prosecution, is not allowed to be asked questions to accuse himself); 1679, Whitebread's Trial, ib. 311, 361 (defendant's witness is not allowed to be asked whether he was a priest, because it would "make him accuse himself"); 1679, Langhorn's Trial, ib. 417, 435 (Oates is not allowed to be asked about "a criminal matter that may bring himself in danger"); 1680, Castlemaine's Trial, ib. 1097, 1096 (similar, for answers to "bring him in danger of his life"); 1680, Earl of Stafford's Trial, ib. 1293, 1314 (a question whereby a witness "shall accuse himself" is objected to); 1681, Plunket's Trial, 8 How. St. Tr. 447, 481 (a witness is not bound to answer questions that "may tend to accuse himself"); 1682, Bird v. Hardwicke, 1 Vern. 109 (bill of discovery, charging compounding a fraud; a plea is allowed, that the answer would "subject him to a forfeiture"); 1682, Anon., 1 Vern. 60 (defendant's argument that "A court of equity ought not to assist a man in recovering a penalty, nor compel a discovery of a forfeiture," is apparently conceded); 1684, Rosewell's Trial, 10 How. St. Tr. 147, 169 (witnesses are not bound "to charge themselves with any crime" or "subject themselves to any penalty"), 1685, Oates' Trial, ib. 1079, 1099, 1123 (witness is not compellable to make himself "obnoxious to some penalty"); 1691, African Co. v. Parish, 2 Vern. 244 (principle conceded); 1700, Firebrass's Case, 2 Salk. 550 (bill against a ranger for discovery of deer-killing; answer as to "what is to make him forfeit his place," is not compelled).

<sup>1</sup> Reading's Trial, *supra*, in 1679.



1685; more, they formally sanctioned the ecclesiastical rule by which the inquisitional oath was allowed.<sup>1</sup>

Moreover, the privilege as yet, until well on into the time of the English Revolution, remained not much more than a bare rule of law, which the judges would recognize on demand. The spirit of it was wanting in them. The old habit of questioning and urging the accused died hard, — did not disappear, indeed, until the 1700's had begun.<sup>2</sup>

The privilege, too, creeping in thus by indirection, appears by

<sup>1</sup> 1642, Bradford's History of the Plymouth Plantation, 465 (answers by one of the ministers to a letter of inquiry from the Governor of Boston: "Quest.: How farr a magistrate may extracte a confession from a delinquent to accuse himselfe of a capitall crime, seeing *Nemo tenetur prodere seipsum*?' 'Ans.: A majestrate cannot without sin neglecte diligente inquisition into the cause brought before him. If it be manifeste that a capitall crime is committed, and that common report, or probabilitie, suspition or some complainte (or the like) be of this or that person, a magistrate ought to require and by all due means to procure from the person (so farr allready bewrayed) a naked confession of the fact . . . ; for though *nemo tenetur prodere seipsum*, yet by that which may be known to the magistrat by the forenamed means, he is bound thus to doe; or else he may betray his countrie and people to the heavie displeasure of God'").

This deliverance is corroborated by the following series of enactments, which exhibit the spirit of the times: —

1641, Massachusetts Body of Liberties, Whitmore's ed., § 45 ("No man shall be forced by torture to confess any crime against himselfe nor any other unlesse it be in some capitall case where he is first fullie convicted by cleare and suffitient evidence to be guilty. After which, if the cause be of that nature that it is very apparent there be other conspiratours or confederates with him, then he may be tortured, yet not with such tortures as be barbarous and inhumane"); § 61 ("No magestrate, juror, officer, or other man, shall be bound to informe present or reveale any private crim or offence, wherein there is no perill or danger to this plantation or any member thereof, when any necessarie tye of conscience binds him to secresie grounded upon the word of God, unlesse it be in case of testimony lawfully required"); 1660, Revised Laws and Liberties, "Punishment," "Jurors" (repeats in substance the foregoing); "Innkeepers" (parties may be examined by the magistrate, for offences against the liquor law); 1672, General Laws and Liberties, same titles (repeats in substance the foregoing; no changes were made as late as 1685).

No attempt has been made to discover the progress of the principle in the other colonies; but their records would doubtless disclose interesting material.

<sup>2</sup> The following are merely a few examples at random: 1656, Nayler's Trial, 5 How. St. Tr. 801, 806; 1660, Scroop's Trial, ib. 1034, 1039; Carew's Trial, ib. 1048, 1054; 1663, Twyn's Trial, 6 ib. 513, 532; 1679, Reading's Trial, 7 ib. 259, 302; 1702, Swendsen's Trial, 14 ib. 559, 580, 581; 1702, Baynton's Trial, ib. 598, 621-625. Sir J. Stephen (Hist. Crim. Law, i. 440) says that the practice of questioning the prisoner "died out soon after the Revolution of 1688"; but this is perhaps giving too early an end to it.

So, too, in the "Choice Cases in Chancery," 1652-1672, containing a short treatise on chancery practice, there is no mention of the privilege, among the rules for witnesses or for parties' answers.

no means to have been regarded as the constitutional landmark that our own later legislation has made it. In all the parliamentary remonstrances and petitions and declarations that preceded the expulsion of the Stuarts, it does not appear at all.<sup>1</sup> Even by 1688, when the courts had for a decade ceased to question it, and at the Revolution the fundamental victories of the past two generations' struggle were ratified by William in the Bill of Rights, this doctrine is totally lacking.<sup>2</sup> Whatever it was worth to the constitution-makers of 1789, it was not worth mentioning to the constitution-menders of 1688. It is a little singular that the later body, who had themselves suffered nothing in this respect, and could herein aim merely to copy the lessons which their forefathers of a century ago had handed down as taught by their own experience, should have incorporated a principle which those forefathers themselves, fresh from that experience, had never thought to register among the fundamentals of just procedure.

But, after all, the still more interesting question is, How did the result come about in England itself? How did a movement, which was directed, originally and throughout, against a method of procedure in ecclesiastical courts, produce in its ultimate effect a rule against a certain kind of testimony in common law courts? The process of thought, popular and professional, is to be accounted for. For our history of legal ideas we do not ordinarily expect to go to Bentham. But he was the first to search into this history, and to maintain that this common law privilege did not antedate the Restoration;<sup>3</sup> and, in this instance, his explanation of the process of thought by which the transmutation historically took place seems fairly to represent the probabilities. That explanation (as indeed the foregoing details exhibit) lies in the principle of the association of ideas, — an association which began to operate immediately in the reactionary period of the Restoration and the Revolution, when the growth and ascendancy of Whig principles involved all the Stuart practices in one indiscriminate and radical condemnation. Read in the light of the foregoing details, the great reformer's words serve as a correct analysis of motives and a fitting summary to the history:

1827, *Bentham, Rationale of Judicial Evidence*, b. ix., pt. iv., c. iii. (Bowring's ed., vol. vii., pp. 456, 460): "Of the Court of Star Chamber

<sup>1</sup> *Ante*, p. 632; Cobbett's *Parl. Hist.*, ii. *passim*. In 1641, Parliament itself was trying its hand at inquisitorial examinations; *ib.* 668, 672.

<sup>2</sup> 1688, 1 W. & M. 2d sess. c. 2.

<sup>3</sup> Mr. Justice Stephen (*History of the Criminal Law*, i. 342) expresses a view similar to Mr. Bentham's.

and the High Commission Court taken together, . . . the characteristic feature was that by taking upon them to execute the will of the king alone, as made known by proclamations, or not as yet known so much as by proclamations, they went to supersede the use of parliaments, substituting an absolute monarchy to a limited one. In the case of the High Commission Court, the mischief was aggravated by the use made of this arbitrary power in forcing men's consciences on the subject of religion. In the common law courts, these enormities could not be committed, because (except in a few extraordinary cases), convictions having never, in the practice of these courts, been made to take place without the intervention of a jury, and the bulk of the people being understood to be adverse to these innovations, the attempt to get the official judges to carry prosecutions of the description in question into effect, presented itself as hopeless. In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be involved in one undistinguishing mass of odium and abhorrence ; more especially any particular instrument or feature, from which the system was seen to operate with a particular degree of efficiency towards such abominable ends? . . . In those days, the supreme power of the state was *de facto* in the hands of the king alone ; . . . being employed and directed against property, liberty, conscience, every blessing on which human nature sets a value, — every chance of safety depended upon the enfeeblement of it ; every instrument on which the strength of that government in those days depended, every instrument which in happier times would to the people be a bond of safety, was an instrument of mischief, an object of terror and odium. . . . No practice could come in worse company than the practice of putting adverse questions to a party, to a defendant (and in a criminal, a capital case), did in that instance."

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SEPARATION AGREEMENTS UNDER THE  
ENGLISH LAW.

AS the common law of England is expounded to-day, a husband and wife may, by their voluntary agreement, divorce themselves as to everything except the right to contract another marriage.<sup>1</sup> As the law was two hundred years ago, they could not in the slightest degree modify the status created by the union.<sup>2</sup> The process by which the change was wrought, the influences that made themselves felt, and the forces that swerved the current of decisions until its course was reversed, form an interesting chapter in the history of English jurisprudence.

The early law was simple. The twain were one. While the common law courts said they had no power to treat marriage as other than a civil contract, yet they held it to be an indissoluble agreement.<sup>3</sup> The union was absolute, and could end only with the death of one of the parties. If there were ante-nuptial barriers, if one of the parties was impotent, or if they were within the prohibited degrees of relationship, there might be an application to the spiritual court, which could decree that for such reason there never was a marriage.<sup>4</sup> If the married state was rendered intolerable by adultery or cruelty the same court could grant a separation from bed and board, but not an absolute divorce.<sup>5</sup> To this unique tribunal, whose jurisdiction included that shadowy realm where legal accountability shades off into mere moral obligation, or religious duty, the unhappy pair must apply. How troublesome the cases were to deal with, the record fully discloses. In the long and often tedious opinions wherein all the petty troubles of discordant spouses are philosophized upon at inordinate length, the curious reader may see outlined the working of the minds of the men who were at once the priests and judges of their people. But one proposition they never forgot nor departed from.

"This court considers a private separation as an illegal contract, implying a renunciation of stipulated duties — a dereliction of those mutual offices, which the parties are not at liberty to desert — an assumption of a false character, in both parties, contrary to the real *status personae*, and to the obligations which both of them have contracted in the sight

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<sup>1</sup> *Besant v. Wood*, 12 Ch. Div. 605.

<sup>2</sup> 1 Blk., Com., 441.

<sup>3</sup> *Ib.* 434.

<sup>4</sup> *Ib.* 434, 435.

<sup>5</sup> *Ib.* 441.

of God and man, to live together 'till death them do part,' and on which the solemnities, both of civil society and of religion, have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient, and sufficiently proved."<sup>1</sup>

So long as the marital status was administered upon by that court there was no departure from this proposition.

While in a certain sense it was not a common law court, yet it administered the law of the realm as to all matters touching marriage, and the settlement of estates. It declared the unwritten law of the land upon these subjects. Nor was it a tribunal existing independent of the source of all civil power, the king. While the inferior judges were appointed by the ecclesiastics, the bishops themselves received their nominations from the sovereign. From the decrees of the court as thus constituted an appeal lay to the king, who was represented for that purpose by the court of delegates. "This commission is frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster and doctors of the civil law."<sup>2</sup> Thus the court came in contact with and was in fact a part of the English judiciary. The law so administered is a part of the common law of England.<sup>3</sup> In this court the rule that deeds of separation are not pleadable<sup>4</sup> was adhered to until the court was abolished in 1857.<sup>5</sup>

There are some early cases wherein the chancery court assumed the power to decree support to the wife in case of dereliction from duty by the husband. Thus, in *Seeling v. Crawley*,<sup>6</sup> the husband had agreed with his wife's father that the wife and their child should be supported in the father's house and at the husband's expense. A bill was brought by the father, in which the wife joined, and performance of the agreement was decreed. It does not appear that any agreement to separate entered into the facts upon which the decree was based. The case merely states that "they agreed to part." There is nothing to indicate that the father was a party to this compact. In other cases decided about the same time, the chancellor decreed maintenance to the wife after there had been proceedings for a separation in the ecclesiastical court.<sup>7</sup>

<sup>1</sup> *Mortimer v. Mortimer*, 2 Hagg. Consist. 310.

<sup>2</sup> 3 Blk., Com., 66.

<sup>3</sup> *Reg. v. Millis*, 10 Cl. & F. 534.

<sup>4</sup> *Mortimer v. Mortimer*, 2 Hagg. Consist. 310.

<sup>5</sup> 20 & 21 Vict. c. 85.

<sup>6</sup> 2 Vern. 386.

<sup>7</sup> *Oxenden v. Oxenden*, 2 Vern. 493; *s. c. Gilbert* 1; *Nicholls v. Danvers*, 2 Vern. 671

These cases seem to involve an invasion of the jurisdiction of the last mentioned court, and are probably to be accounted for by the confused ideas concerning the limits of their respective powers incident to and following after the abolition of the ecclesiastical tribunal during the period of the commonwealth.<sup>1</sup>

In 1721, one of these agreements was incidentally drawn in question in a case before the king's bench. The uncongenial pair had separated, and property was settled upon the wife. Thereafter the husband repented of his course (apparently as to the maintenance only), and, asserting the ancient claim to complete control over the weaker vessel, forcibly seized her and incarcerated her in the royal mint. She did not choose to submit to such indignity, and sued out a writ of *habeas corpus*. The court granted her prayer for liberty, but the reason for the action taken is left in doubt. The reporters fail to agree. One of them credits the court with using the following language : —

“An agreement between husband and wife to live separate, and that she shall have a separate maintenance, shall bind them both until they both agree to cohabit again ; and, if the wife be willing to return to her husband, no court will interpose or obstruct her. But, as to the coercive power which the husband has over his wife, it is not a power to confine her ; for by THE LAW OF ENGLAND she is entitled to all reasonable liberty, if her behaviour is not very bad.”<sup>2</sup>

According to this report the court was doubly sure of its ground. First, the agreement cut off his right to imprison her ; and second, he had no such right to lose. Strange gives a different version of the judicial utterance. He says : —

“And, all this matter appearing, and that he declared he took her into his power in order to prevail with her to part with some of her separate maintenance, the chief justice declared, and all the rest agreed, that where the wife will make an undue use of her liberty, either by squandering away the husband's estate, or going into lewd company, it is lawful for the husband, in order to preserve his honor and estate, to lay such a wife under restraint. But where nothing of that appears, he cannot justify the depriving her of her liberty ; that there was no color for what he did in this case, there being a separation by consent.”<sup>3</sup>

If this is the correct statement of the opinion the reliance upon the case as an authority for the validity of such arrangements has been an error. It only decides that for certain causes the husband

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<sup>1</sup> 1 Fonb., Eq., 97 note.

<sup>2</sup> Lister's Case, 8 Mod. 22.

<sup>3</sup> Rex v. Lister, 1 Str. 478.

may restrain the wife, and then goes on to show that none of the causes existed in the case under consideration.

In 1725 the family troubles of Sir Cleaves More came before the court. His wife was living apart from him, and had property payable by trustees to whom she should appoint. Upon his forcibly retaking her, she offered to appoint a part of the property to him as a price for her freedom. The proposition was agreed to, the appointment was made, and she went her own way. The trustees took a different view of the matter, and declined to honor the appointment. The husband brought suit and recovered.<sup>1</sup> There was no discussion of the question whether his agreement to permit her to renew the adulterous intercourse from which he had taken her was a valid contract. At times the case has been cited as an authority for the validity of separation agreements. The better opinion is that expressed by an early text-writer: The wife could appoint the property to whom she chose, and for such act no consideration was needed.<sup>2</sup>

In 1747 Lord Chancellor Hardwicke had occasion to examine the law upon the subject. He stated the result of his investigations as follows:—

“As to the liberty prayed for, it is not in the power of the court to decree it, and I do not find that this court ever made a decree for establishing a perpetual separation betwixt husband and wife, or to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even upon this unwillingly.”<sup>3</sup>

The first case that in terms held a separation agreement to be a valid contract was decided in 1757. John Wilkes sued out a writ of *habeas corpus* to obtain the custody of the person of his wife, who was living with her relatives under an agreement with him. The court held the agreement to be a formal renunciation by the husband of his right to seize her or force her back to live with him.<sup>4</sup> The case is imperfectly reported; but apparently correctly states what was decided, as none of its critics have suggested that there was any error in that respect. It was the subject of much adverse comment. Lord Eldon said of it:—

“When I see such *dicta* as occur in the case of *King v. Mead* falling from great men, and establishing a course of decision that can be demon-

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<sup>1</sup> *More v. Freeman*, Bunb. 205.

<sup>2</sup> 2 Roper, Hus. & Wife, 294 note.

<sup>3</sup> *Head v. Head*, 3 Atk. 547.

<sup>4</sup> *Rex v. Mead*, 1 Bur. 542.



strated to stand upon no principle consistent with the law of the land, I feel great difficulty in deciding upon such authority." <sup>1</sup>

Shortly after it was decided, the court of chancery dismissed a bill because it set up a separation agreement.<sup>2</sup> A few years later Blackstone declared that a suit could not be maintained against a married woman, "except in the known excepted cases of abjuration, exile, and the like; where the husband is considered as dead, and the woman as a widow." <sup>3</sup>

It was thus that the English common law stood in 1780. In all proceedings for the settlement of estates, in suits for nullity and such limited divorce as was obtainable, these agreements were wholly void. Courts of chancery refused to recognize them, and their efficacy was denied in the later cases before the common bench. This state of affairs contrasted sharply with that in continental Europe. There the husband and wife could contract with each other, and she might be sued without joining him.<sup>4</sup>

It was about this time that Lord Mansfield appears to have first given the matter serious attention. For a quarter of a century he had been remodelling the common law with the free hand of a modern legislator. Sitting nominally as the Chief Justice of a court that interpreted the law, he in fact created the law of negotiable paper, insurance, and other subjects closely connected with the commercial interests of the people. That the reforms were needed is too apparent to require elaboration. Whether the end justified the extraordinary means used is not a question to discuss here. It is only important to notice the tendency to legislate as bearing upon the weight to be accorded to the decisions rendered.

It is equally apparent that the continental idea must have appealed strongly to Lord Mansfield. He was deeply versed in and an ardent admirer of the civil law, while his feeling towards the common law bordered upon contempt. His object seems to have been to shape the law so as to promote the commercial greatness of the people. Considerations looking solely to the preservation of domestic ties would find little favor with him, when placed in the balance over against what might be termed a good business proposition. Although a man of high character, he had little of human affection. His great admirer, Lord Campbell, says of him:—

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<sup>1</sup> *St. John v. St. John*, 11 Ves. 526.

<sup>2</sup> *Wilkes v. Wilkes*, 2 Dick. 791.

<sup>3</sup> *Hatchett v. Baddelly*, 2 Wm. Bl. 1079; *Lean v. Schutz*, Ib. 1195.

<sup>4</sup> *Cod. Jur. Civ.* 4, 12, 1; 1 *Burge, Com. Col. & For. Laws*, 262 *et seq.*



“He had no warmth of affection ; he formed no friendships ; and he neither made exertions nor submitted to sacrifices purely for the good of others. The striking fact to prove that he *reasoned* rather than *felt* is, that he never revisited his native land, from the time when he first crossed the border riding a Highland pony on his way to Westminster ; although he left behind him his father and mother, who survived many years, and were buried in the church at Scone.”<sup>1</sup>

In 1783 the question came before him in the following manner. Lord and Lady Lanesborough had separated, and property was settled upon her. His lordship removed to Ireland while she continued to live in England, and there contracted sundry debts. Suits being brought therefor, she set up her coverture as a defence. Lord Mansfield said : —

“The agreement of separation bound both the parties in the same manner as if they had been sole, and the court will not suffer either of them to break through it. Under the agreement the wife possesses a separate property. She is no longer under the control of her husband, and creditors, even for necessities, have no remedy against him. Credit was given to her as a single woman ; and shall she now be permitted to say that she was not single ? . . . We are of opinion that the case resembles abjuration or exile in every particular, that the wife therefore may be sued alone, and that she cannot avail herself of this most iniquitous defence.”<sup>2</sup>

In the following year he reiterated his views : —

“The general principle of law is against her liability. But *quicquid agant homines* is the business of courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind. Hence, centuries ago, exceptions have been engrafted upon this rule, as in the case of abjuration, &c. The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated, and possess separate property, a practice unknown to the old law.”<sup>3</sup>

Finally, in 1794, he declared the doctrine to be firmly settled. A few sentences will show the line of reasoning : —

“Lord and Lady Percy, by a deed, mutually agree to live separate ; neither can break this agreement. . . . The claim upon which the action is founded is of a most meritorious nature. . . . In justice, then, she ought to pay this debt. . . . In the ancient law there was no idea of a separate maintenance ; but when it was established, what said the courts ?

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<sup>1</sup> Lives of the Chief Justices.

<sup>2</sup> Ringsted v. Lanesborough, 3 Doug. 197.

<sup>3</sup> Barwell v. Brooks, 3 Doug. 371.

That the husband shall not be liable, even for necessities ; and they said so because convenience and justice required it. . . . I am of opinion the present case is quite determined by the two late ones, which . . . rest . . . upon the great principle which the court has laid down, ' that where a woman has a separate estate, and acts and receives credit as a *feme sole*, she shall be liable as such.' " <sup>1</sup>

It is curious to note that in this case Lord Mansfield's most ardent admirer, Sir Francis Buller, relied like a black letter pleader upon the precedents established by his chief. In the face of the admitted legislation in those cases, he gravely declared that " as to the prudence of the measure, that is no ground on which the court can found their decision."

These cases involved a wide departure from the theory of the common law. Moved to indignation by the seeming injustice to the too confiding tradesmen, the Chief Justice had overlooked the weightier matters involved. The effect of the decisions upon the marital status, the fact that they made limited divorce a thing to be had by the mere agreement of the parties, was not considered by the court. These matters were but little discussed while Lord Mansfield remained upon the bench.

In 1786 he was compelled by the ill's incident to his fourscore years to retire to his estate at Kenwood. He was solicitous that his favorite associate, Sir Francis Buller, should become his successor, and for two years held the office of Chief Justice without being present in court ; while Justice Buller in fact discharged the functions of the office. At last Lord Mansfield realized that further opposition to the wishes of Thurlow and Pitt was useless. A parliamentary investigation of the situation was threatened, the Chief Justice resigned in 1788, and Lloyd Kenyon, Master of the Rolls, was appointed his successor. Sir Francis Buller stifled his chagrin for about five years, and then resigned to accept a seat upon the inferior court of the common bench.

Lord Kenyon had risen to his high station through many difficulties. Born to the lot of a second son of a poor Welsh squire, scantily educated and articled to an attorney at the age of fourteen, he had little opportunity to acquire knowledge, except of the law. Of the polite learning of the day he was profoundly ignorant. He knew nothing of the amenities of social life, and scarcely regarded its decencies. During the years of his practice his work had been largely writing opinions for more prosperous and less well informed members of the profession, and it was by rendering this sort of

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<sup>1</sup> Corbett v. Poelnitz, 1 T. R. 5.

assistance to Lord Thurlow that he first came to be appointed to office.

The contrast between the new Chief Justice and his predecessor was striking. Mansfield was an accomplished man of the world, and a finished orator. Kenyon was a recluse, with no gift of speech. Mansfield was for reform and progress, and did not always scan too closely the way that sufficed for the time to carry him to his conclusion. Kenyon was the disciple of precedent, and followed where the black letter *dictum* led, no matter what the result. Instead of entertaining that high opinion of each other's good qualities which sometimes makes fast friends of those of opposite natures, they failed utterly to see any good in each other, and their personal dislike for one another was intense. Kenyon believed that he had been snubbed by Mansfield; and Mansfield openly expressed his contempt for the man who was ignorant of the classics.

It may be that these facts had no influence upon the decisions rendered; but it is of interest to note that the results are such as would have been brought about had such causes been allowed to operate. Accordingly, we find Justice Buller at all times adhering to the views expressed by Lord Mansfield. In 1788, while sitting for the Lord Chancellor, he declared that separation deeds were valid when fairly entered into, and that courts of equity had jurisdiction to enforce performance of the same.<sup>1</sup> Shortly thereafter, and while acting in the same capacity, he remarked, *obiter*, that it had been decided that as to everything but the right to remarry the parties could divorce themselves.<sup>2</sup> This is the first plain statement to be found in the reports of the legitimate result of the innovations introduced by Lord Mansfield. It did not pass unchallenged. The case was sent out for the opinion of the common pleas upon the law, and Chief Justice Loughborough declared that the question of the liability of a wife to a suit, when living apart from her husband, was still an open one.<sup>3</sup>

In 1790 the ecclesiastical court once more declared its adherence to its earlier decisions.<sup>4</sup> Two years later the Master of the Rolls followed the *dictum* of Justice Buller, and decreed specific performance of an agreement to live separate, and that, too, in spite of the husband's offer to renew cohabitation.<sup>5</sup> The case was not

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<sup>1</sup> Fletcher v. Fletcher, 2 Cox Ch. 99.

<sup>2</sup> Compton v. Collinson, 2 Bro. Ch. 377.

<sup>3</sup> s. c. 1 H. Bl. 334.

<sup>4</sup> Nash v. Nash, 1 Hagg. Consist. 140.

<sup>5</sup> Guth v. Guth, 3 Bro. Ch. 614.

followed, and in a short time Lord Chancellor Loughborough denied that equity had any jurisdiction of suits involving the marital relation.<sup>1</sup>

In 1792 Justice Buller again went outside what was necessary to dispose of the case in hand in order to declare his continued adherence to the views of his late chief. One J. Greygoose petitioned for a writ of *habeas corpus* to bring up the body of his wife, who was detained by the defendant. One defence set up, but imperfectly pleaded, was a separation agreement, and *Rex v. Mead* was relied upon. Justice Buller said: "If this case turn out on further examination to be like that in *Burrow*, I am strongly inclined to think that this would be an answer to the writ. But that is not at present made out."<sup>2</sup> The absence of the Chief Justice when the decision was rendered, explains why the *dictum* was passed by in silence.

Lord Kenyon first had occasion to consider the question in 1794. While he found other grounds upon which to dispose of the case, he indulged in these characteristic comments: —

"I confess that I do not think that the courts ought to change the law so as to adapt it to the fashion of the times; if an alteration in the law be necessary, recourse must be had to the legislature for it."<sup>3</sup>

This was after Justice Buller had retired from the king's bench.

Two years later Lord Kenyon spoke in a similar strain: —

"We must not by any whimsical conceits, supposed to be adapted to the altering fashions of the times, overturn the established law of the land. It descended to us as a sacred charge, and it is our duty to preserve it."<sup>4</sup>

In 1800 the vexed question arose in a case before Lord Chancellor Eldon. He said that he would not decide it, because it was already pending in a case that was shortly to be argued before all twelve judges. He did not, however, deny himself the pleasure of reviewing and pointing out the errors in the opinions of the late Chief Justice.<sup>5</sup> His motive may have been an eminently proper one; but we are unable to keep out of view his hostility to Lord Mansfield. He never forgot his early experiences before the king's bench, nor relinquished the belief that he was driven therefrom to practice in the more obscure chancery court by the partiality of

<sup>1</sup> *Legard v. Johnson*, 3 Ves. 352.

<sup>2</sup> *Rex v. Winton*, 5 T. R. 89.

<sup>3</sup> *Ellah v. Leigh*, 5 T. R. 679.

<sup>4</sup> *Clayton v. Adams*, 6 T. R. 604.

<sup>5</sup> *Beard v. Webb*, 2 Bos. & P. 93.

the Chief Justice for "young lawyers who had been bred at Westminster School and Christ Church."

The case referred to by Lord Eldon was regarded by the court as an important one. It was twice argued before all the judges, except Justice Buller, who at the time of the second hearing was confined to the house by the illness from which he died the following summer. Lord Kenyon expressed his sympathy for Sir Francis "whose absence on every account we had occasion to regret." How much of the regret was Pickwickian we are not informed.

The unanimous opinion of the court was delivered by the Chief Justice. To make assurance doubly sure, he announced the concurrence of Chief Justice Eyre of the common bench, who sat at the first argument, but retired before the last. The gist of the opinion, overruling the decisions of Lord Mansfield, is as follows:—

"The ground on which the plaintiff in this case rests his claim is an agreement between the defendant and her husband to live separate and apart from each other. That is a contract supposed to be made between two parties, who, according to the text of *Littleton*, *f.* 168, being in law but one person, are on that account unable to contract with each other; and if the foundation fail, the consequence is that the whole superstructure must also fail. This difficulty meets the plaintiff *in limine*. If it did not, and the parties were competent to contract at all, it would then become material to consider how far a compact can be valid which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married, and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. In the course of the argument some of these difficulties were pointed out, and it was asked whether, after such an agreement as this, the temporal courts could prohibit it if either were to sue in the ecclesiastical court for restitution of conjugal rights? Whether the wife, if she committed a felony in the presence of her husband, would be liable to conviction? Whether they could be witnesses for and against each other? Whether they could sue and take each other in execution? And many other questions will occur to every one to which it will be impossible to give a satisfactory answer. For instance, it may be asked how it can be in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage, while it subsists, and from thence to infer rights of action and legal responsibilities as consequences following from such alteration of character and condition? Or how any power short of that of the legislature can change that which, by the com-

mon law of the land, is established as the course of judicial proceedings?"<sup>1</sup>

However much one is disposed to admire the elegant and accomplished William Murray, Baron of Mansfield, to smile at the crudities, or carp at the ill-temper and stiff will of Lloyd Kenyon, it must be admitted that in this instance reason and precedent were with the latter. The clamor of indignant tradespeople, and the well-bred murmur of disapproval from scandalized society, alike fell upon deaf ears. If the mercer would collect his bill, let him be chary who he trusted. If social vices must be glossed over with a so-called separation contract, the court was not to be made a partner in the scheme. That was the law. If changes were needed, apply to Parliament.

Soon the doughty Welshman followed his Scotch rival down to the common level. Lord Kenyon died in 1802, and was in turn succeeded by an implacable enemy. Sir Edward Law acquired fame from his defence of Warren Hastings, and was thereafter conceded the leadership of the bar. From that time he felt sure of his position, and freely used his powers of sarcasm in holding the oddities and shortcomings of the Chief Justice up to ridicule. When he took his seat upon the bench, he said to a friend that "his feelings as a barrister had been so often outraged by the insults of Lord Kenyon, he should now take care that no gentleman at the bar should have occasion to complain of any indignity in his court."<sup>2</sup> He forgot the good resolution before adjourning his first term of court, and apparently never thought of it thereafter.

Upon the second day he presided, the new Chief Justice (who had taken the sonorous title of Baron of Ellenborough) had occasion to pass upon a separation agreement. George Chambers and the Honourable Jane Rodney, his wife, having had differences, entered into a compact whereby he agreed to make certain payments to trustees for her, in case of a future separation. That event soon took place, the payments were not made, and the trustees brought suit upon the agreement. The case was argued upon the question of the general invalidity of such covenants, and especially to the point that one for a future separation is void. The Chief Justice declared that the contract was valid because "the question which has been agitated appears to have been laid at rest for a long time

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<sup>1</sup> *Marshall v. Rutton*, 8 T. R. 545.

<sup>2</sup> *Campbell's Lives of the Chief Justices*.



by repeated decisions and the uniform practice of the courts." As to the question of future separation, he thought this agreement no worse than others that had been upheld.<sup>1</sup>

*Marshall v. Rutton* was not cited by counsel, nor alluded to by the court. Counsel very likely had a lively recollection of the fact that at the last hearing of that case Sir Edward Law argued for the plaintiff, against whom judgment was thereafter rendered. Justices Grose, Lawrence, and Le Blanc, who now wrote opinions concurring with the Chief Justice, thought silence the most discreet way to avoid the conflict between their decision against Sir Edward as an advocate and their concurrence with him as their chief. They conveniently overlooked the battle that had just been fought over the question of the power of parties to modify the marital status; and, going back a hundred years, relied upon ill reported cases from the chancery side of the court. *Nichols v. Danvers*<sup>2</sup> was a case where there was a separation by agreement. There was also a decree for maintenance. Vernon noted only these facts, and the case is reported as one wherein an agreement to live apart was enforced. The register's book shows that there had been proceedings in the ecclesiastical court for cruelty, and this was only an application for alimony, in accordance with the practice after the Restoration.<sup>3</sup> These facts were overlooked by the editors of the Vernon manuscript, in a manner quite characteristic of their reportorial work.<sup>4</sup> It is upon this case that *Rodney v. Chambers* depends.

If any one is seeking evidence to sustain the theory that these agreements are calculated to promote improper ways of living, he may be interested in the sequel to Lord Ellenborough's decision. Three years after its rendition the husband recovered a verdict of £2000 from one Caulfield because of his adultery with the plain-

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<sup>1</sup> *Rodney v. Chambers*, 2 East 283.

<sup>2</sup> 2 Vern. 671.

<sup>3</sup> 1 Fonbl., Eq., 97 note.

<sup>4</sup> The ignominy of having palmed off upon the profession the two volumes that bear his name ought not to be charged to the memory of that really excellent lawyer. He took extensive notes, but apparently for his own use only. After his decease there was a lively contest over the manuscript. The executor claimed it as an asset of the estate, the widow thought it was bequeathed to her as a part of the household goods, and the heir insisted it was his as the guardian of his ancestor's reputation. Finally it was agreed that it should be printed by the court without profit to any one. *Atcherly v. Vernon*, 10 Mod. 518, 530. The unpalatable truth, suggested by counsel for the heir in argument, that the manuscript was "possibly not fit to be printed," was not heeded. So it came about that the name of Vernon has been handed down to the present generation as a synonym for shiftless reporting, when in fact he was an accomplished lawyer, and never thought himself a reporter at all.

tiff's wife.<sup>1</sup> In this case the Honourable Jane becomes plain Mrs. Chambers.

Lord Ellenborough's views were not favorably received. Lord Eldon at once expressed a strong disapproval of the case and the theories that it advocated. But he reluctantly conceded that if the practice of upholding the covenants as to property rights had become fixed he could not overturn it.<sup>2</sup>

The Court of Common Pleas were unable to agree upon the question whether a husband was liable for necessities furnished to his separated wife because of his failure to perform his contract for her support.<sup>3</sup> The associate justices thought he was liable; while the Chief Justice, Sir James Mansfield, dissented, basing his opinion upon the reasoning of Lord Mansfield.

Sir William Grant, Master of the Rolls, considered the agreement as void, except as to property rights. He said: —

"I apprehend it to be now settled that this court will not carry into execution articles of separation between husband and wife. It recognizes no power in them to vary the rights and duties growing out of the marriage contract, or to effect, at their pleasure, a partial dissolution of that contract. It should seem to follow that the court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenants between the husband and the trustee is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law."<sup>4</sup>

He added, however, that the cases seemed to establish the validity of the property arrangement; and so he gave effect to an appointment by a separated wife of property deeded by her husband to trustees, in consideration of their promise to save him harmless from her debts, etc.

In 1818, the ecclesiastical court once more declared its adherence to the doctrine that the agreement was void. Sir William Scott, of the consistory court of London, was in full sympathy with his more distinguished brother, Lord Eldon. He declared the position of the ecclesiastical courts as follows: —

"These courts therefore to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uni-

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<sup>1</sup> *Chambers v. Caulfield*, 6 East 244.

<sup>2</sup> *St. John v. St. John*, 11 Ves. 526.

<sup>3</sup> *Nurse v. Craig*, 2 Bos. & P. (N. R.) 148.

<sup>4</sup> *Worrall v. Jacob*, 3 Mer. 256.



formly rejected such covenants as insignificant in a plea of bar, and leave it to other courts to enforce them, so far as they may deem proper upon a more favorable view (if they entertain it) of their consistency with the principles of the matrimonial contract.”<sup>1</sup>

Lord Eldon had the question before him again in 1821. He dismissed a bill brought for the cancellation of a separation deed, upon the ground that its invalidity was as available a defence at law as in equity. In speaking of the character of the instrument he said : —

“I perceive that it seems to have struck every one as extraordinary that such deeds should ever have been supported. . . . It has always seemed to me very difficult to hold these deeds legal. It seems to be admitted that a mere agreement to live separate is one that would not be deemed valid ; and it seems strange, as Sir William Grant observes, that if the primary object be vicious, these auxiliary provisions should be held good and thereby the objects which the law objects to should be carried into effect.”<sup>2</sup>

Other chancery judges looked at the matter differently. Richards, Lord Chief Baron of the Exchequer, said : —

“The question is not what the law ought to be, but what it is ; and the opinions of judges, however great and learned, are not to be put in competition with decisions determining the point and settling the law.”

Baron Graham added : —

“The language of regret is certainly found to be used by many of the judges ; but the law is clearly established, and such demands have been constantly enforced.”<sup>3</sup>

In cases arising soon after this it was decided that the agreement was valid so far as it related to a provision for the wife,<sup>4</sup> but invalid if separation did not take place until a future day.<sup>5</sup>

Still the law seemed far from being settled. Notwithstanding many rebuffs from the courts, the conveyancers persisted in advising the use of the tabooed contract. There was practically no divorce obtainable, and this sort of an armistice was the only relief to be had from a union that had proved unendurable. The agreement was made, and the parties trusted to each other's honor to carry it out. If, however, the wife saw fit to resist a suit, her coverture was a defence and the agreement only a rope of sand.

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<sup>1</sup> *Mortimer v. Mortimer*, 2 Hagg. Consist. 310.

<sup>2</sup> *Westmeath v. Westmeath*, Jac. 126.

<sup>3</sup> *Ross v. Willoughby*, 10 Price 2.

<sup>4</sup> *Jee v. Thurlow*, 2 B. & C. 547 ; *Wilson v. Mushett*, 3 B. & A. 743.

<sup>5</sup> *Hindley v. Westmeath*, 6 B. & C. 200.

In 1835 the matter first came up for consideration in the House of Lords. The question was whether a separated wife could acquire a domicile of her own. The office of Chancellor being vacant, Lord Brougham presided. If his opinion does not carry the weight a different authorship might give, it is an interesting specimen of the work of a versatile writer and fairly accurate judge. In speaking of the agreement he said:—

“What is the legal value or force of this kind of agreement in our law? Absolutely none whatever, in any court whatever, for any purpose whatever, save and except only one, — the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach; no specific performance of its articles can be decreed. No court, civil or consistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common law courts that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife, — nay, even when he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him, — all is utterly insufficient to repel the claim which he makes for the loss of her society, without doing any act either in court or *in pais* to determine the separation or annul the agreement.”<sup>1</sup>

The concurrence of Lord Lyndehurst is a strong indorsement of the soundness of the decision. At this time both these ex-Chancellors were plotting and scheming to again take possession of the great seal. They presided by turns over the judicial sessions of the House of Lords during the spring of 1835, and neither lost an opportunity to criticise the other.<sup>2</sup>

At about this time suit was brought in the common pleas for money agreed to be paid as a consideration for executing a separation deed. The court admitted that a promise to separate in the future, or any inducement to make such a promise, was illegal. On the other hand, a present separation was declared to be good. The deed was construed as one of the latter class.<sup>3</sup> The appeal to the exchequer resulted in an affirmation by a divided court, Lord

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<sup>1</sup> Warrender v. Warrender, 2 Cl. & F. 488.

<sup>2</sup> Campbell's Lives of the Chancellors.

<sup>3</sup> Waite v. Jones, 1 Bing. N. C. 656.

Denman and Baron Abinger dissenting. The opinion of Chief Justice Denman is of especial value. It had been long since the position had been filled by one of so high character, broad general culture, and excellent judgment. In plain and convincing language he disapproved of the whole doctrine of separation by agreement, and modestly stated his conclusion as follows: —

“If I could venture to lay down the principle which alone seems to be safely deducible from all the cases, it is this; that when a husband has by his deed acknowledged his wife to have a just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation on being relieved from liability to her debts, he shall not be allowed to impeach the validity of that covenant.”<sup>1</sup>

By 1842 the case had travelled the long journey to the House of Lords. The contract was again upheld in a brief opinion. There was no reference to the strong language indorsed by that august tribunal only seven years before; and Lord Brougham himself concurred in the decision.<sup>2</sup>

From this time the courts seem to have been fairly committed to the theory that these agreements were valid except as to the one provision that was of the essence of each of them. While the judges acknowledged that the situation was illogical, they rested upon the now useful doctrine of *stare decisis*.

“It is in vain to regret the perplexities in which courts have found themselves involved by enforcing the minor and auxiliary parts of the agreement to separate, while they profess to repudiate the principal and essential part and motive of it.”<sup>3</sup>

In 1848 the House of Lords went further, and, holding the agreement to continue to live apart to be a valid contract, decreed specific performance of its covenants.<sup>4</sup> Their lordships admitted that the decision was contrary to the old law, and based their conclusion upon recent cases. The deed in question was one executed as a part of the settlement of the wife's suit for nullity in the ecclesiastical courts, and the case might have been disposed of without the radical steps that were taken.

Soon after this, Lord Romilly, Master of the Rolls, considered the statement that such deeds had been upheld “in a great number

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<sup>1</sup> Jones *v.* Waite, 5 Bing. N. C. 341.

<sup>2</sup> Jones *v.* Waite, 4 M. & G. 1104.

<sup>3</sup> Frampton *v.* Frampton, 4 Beav. 287.

<sup>4</sup> Wilson *v.* Wilson, 1 H. L. C. 538.

of cases" a sufficient reason for enjoining a breach of a covenant not to interfere with a separated wife.<sup>1</sup>

An occasional remonstrance was still heard. In 1858 the court of chancery declared that the sole foundation of these contracts was a covenant that no court would enforce.<sup>2</sup> In general, however the tendency to uphold the agreements was followed.<sup>3</sup>

Lord Chancellor Westbury enjoined a separated wife from bringing suit for restitution in the divorce court, because such action would violate the terms of a separation deed. The divorce court succeeded the ecclesiastical tribunal in 1857,<sup>4</sup> and administered the law in a similar manner.<sup>5</sup> The chancellor justified the decision by reasoning that separation deeds were valid, although the ecclesiastical doctrine was different, because by a statute of Henry VIII. the ecclesiastical law was made subordinate to the common law; that the decision of the House of Lords in *Wilson v. Wilson*, overruling the earlier cases, must be treated like a statute; and that while a voluntary separation was an offence against the ecclesiastical law, it was not one against the common law, and therefore the rights in controversy were only private, and public policy was not involved.<sup>6</sup> A decision of the appeal to the House of Lords was prevented by the death of Mrs. Hunt.

Sir George Jessel, Master of the Rolls, treats the matter in the following characteristic fashion:—

"For a great number of years both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy, that husband and wife should agree to live separate; and it was supposed that a civilized country could no longer exist if such agreements were enforced by courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy, other considerations arose, and people began to think that, after all, it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately; and that was the view carried out by the courts when it became once decided that separation deeds *per se* were not against public policy."<sup>7</sup>

<sup>1</sup> *Sanders v. Rodway*, 16 Beav. 207.

<sup>2</sup> *Vansittart v. Vansittart*, 2 DeG. & J. 249.

<sup>3</sup> *Webster v. Webster*, 1 Sm. & G. 489; *Randle v. Gould*, 8 El. & B. 457; *Williams v. Baily*, L. R. 2 Eq. 731; *Rowley v. Rowley*, L. R. 1 H. L. Sc. 63; *Gibbs v. Harding*, L. R. 8 Eq. 490.

<sup>4</sup> 20 & 21 Vict. c. 85.

<sup>5</sup> *Ib.* s. 22.

<sup>6</sup> *Hunt v. Hunt*, 4 DeG., F., & J. 221.

<sup>7</sup> *Besant v. Wood*, 12 Ch. Div. 605.

Sir George was a Hebrew, and the first Jew to attain to judicial honors in England. It would be natural that law founded in part upon Christian ecclesiastical polity should find scant favor with him.

The case has an added interest for the American student because of the career of the wife, Annie Besant. While she was advocating female suffrage and preaching the doctrines of theosophy from American platforms, a long and bitter struggle was being waged in the English courts over her domestic relations. Her clerical husband agreed to a separation, and as a part of the arrangement each parent was to have the custody of one of their two children. Thereafter he sued for and obtained the custody of the child who he had solemnly covenanted should remain with the mother. Thereupon the wife, conceiving that, as the consideration for the agreement had been taken from her by the court, it was no longer binding upon her, sought to renew cohabitation.

"But the court deemed that the policy of the law made her agreement for separation controlling over her, and the consideration for it void as to him. This exquisitely refined principle of high honor does not pertain to the laws of so young a people as we are."<sup>1</sup>

Following out the same theory, the court of probate and divorce held a contract not to demand restitution valid; and that, as the act of 1873 had made all defences available there which would be anywhere, the agreement could be pleaded in bar.<sup>2</sup>

Finally, to show that all the old notions upon the subject had been exploded, it was decided in 1888 that a trustee was not needed, and the parties could make the contract directly with each other.<sup>3</sup> The case does not depend upon modern statutes enlarging the powers of married women. It is expressly put upon common law ground.

It remains to be seen whether the higher courts are to follow these extreme cases. It seems probable that they will.<sup>4</sup>

It is difficult for us here to realize the extent to which the idea that "social policy"<sup>5</sup> demands the upholding these agreements prevails there. Another fruitful source of evil has been the great number of family settlements each more or less tainted with such

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<sup>1</sup> 1 Bish., Marr. & Div., s. 634a, note.

<sup>2</sup> *Marshall v. Marshall*, 5 Prob. Div. 19.

<sup>3</sup> *McGregor v. McGregor*, L. R. 20 Q. B. D. 529.

<sup>4</sup> *Rowell v. Rowell*, [1900] 1 Q. B. 9; *Hunt v. Hunt*, [1897] 2 Q. B. 547; *Sweet v. Sweet*, [1895] 1 Q. B. 12.

<sup>5</sup> *Wennhak v. Morgan*, 20 Q. B. D. 635.

covenants. Seventy-five years ago, the title to half the property in England stood in the name of nominal owners.<sup>1</sup> The family conveyancer, possessed of the secret of the family skeleton and anxious to be its sole guardian, has ever been ready to promote a "settlement" that would avoid the public scandal of a divorce suit. Still another potent cause for what has occurred was the fact that practically no divorce was obtainable. A separation from bed and board might be decreed, but that mockery is not worthy the name of divorce.

These are the causes that created the undercurrent and dragged the law from its ancient and safe moorings. The departure from established principles was slow, but none the less certain. First the undoubted rule was announced that an agreement by the husband to support his wife was but a performance of a part of his duty. This was quickly seized upon by the conveyancers, and the result was a great number of annuities and other settlements, ostensibly made for the purpose of furnishing support, and each in fact depending upon an illegal promise to live separate. For a time a decent regard for the old law was shown, and the promise of a trustee to furnish support was always a part of the contract. Then this concession to old-fashioned ideas was abandoned, and courts enforced property covenants admittedly founded upon an illegal promise. Nor was this the end of judicial sophistry. The next step was to argue that while on the face of things the courts had gravely declared the covenant for separation to be invalid, yet by enforcing agreements dependent thereon they had in reality held the whole to be good. The opposition to this line of reasoning was constant for many years. The names of some great English jurists are found among those opposed to the continental idea. They believed that the marital status is something more than a mere civil contract relation; and that its modification is not to be accomplished, except with the consent of the state as evidenced by the decree of a competent court. Nevertheless the so-called liberal idea seems to have finally prevailed, and the *dictum* of Justice Buller is now the law of England. As to everything but the right to remarry the parties may divorce themselves.

R. J. Peaslee.

MANCHESTER, N. H.

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<sup>1</sup> 2 Kent, Com., 182.

# HARVARD LAW REVIEW.

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It has been found advisable to begin and end the volumes of the REVIEW with the academic year. The current volume, therefore, will contain ten numbers, continuing until June, and subsequent volumes will begin with the November number of each year. The analytical index of the fifteen volumes will be issued shortly after the completion of the current volume, instead of in April as previously announced.

RENDITION OF DESERTERS FROM FOREIGN FORCES. — A case recently decided by the Supreme Court of the United States raises collaterally an interesting question in jurisdiction. The Cramp Ship Building Company was building the cruiser Variag for the Imperial Russian Navy under a contract providing that as fast as constructed the title should vest in the Russian Government, subject however to the right of rejection until possession was taken and payment made. At the request of the Russian Government, the Secretary of the Treasury admitted free of the immigration tax, an officer and fifty-three men who were to form part of the crew. After the Variag was launched, but before she was completed, one of these men deserted, with the intention of becoming a citizen of the United States. At the request of the Russian Vice-Consul, he was arrested and committed, under Art. 9 of the Treaty with Russia of 1832 (8 U. S. Stat. 444) providing for the arrest, etc., of "deserters from the ships of war and merchant vessels of their country." It was



held by the court (Fuller, C. J., Harlan, Gray, and White, JJ., dissenting) that he was a deserter from a ship of war within the meaning of the treaty. *Tucker v. United States ex rel. Alexandroff*, 22 Sup. Ct. Rep. 195. It is correctly stated that before the Variag was launched she could not be considered a ship. *The Jefferson*, 20 How. (U. S. Sup. Ct.) 393. But, though for purposes of admiralty jurisdiction she became a ship the moment she was launched, that should not conclude the question whether she was a ship of war within the meaning of the treaty. Furthermore, it is almost obvious that the object of the treaty provision is to prevent foreign vessels visiting our ports from being crippled by the desertion of their seamen; it is not for the purpose of aiding shipbuilding for foreign governments, and protecting the arrangements for completing and manning ships.

If, however, the conditions in the principal case do come within the treaty, the provisions of that treaty must, of course, be applied. The reasoning on which an affirmative conclusion is reached is somewhat fallacious. It is said that since the ship was built for the Imperial Russian Government, it is exempt from jurisdiction; and that being exempt from jurisdiction it must be a ship of war since it cannot be called a merchant vessel. It is submitted that this does not follow as a matter of course. Property of a sovereign is in every case exempt from jurisdiction in civil suits. *The Parlement Belge*, 5 P. D. 197, 214. In addition to this, by the terms of the contract, though property in the materials passed as the construction went on, the government had the right of rejection at any time up to completion and final payment. The vessel was in the hands of the builders, had not been accepted nor commissioned by the Russian Government, and it would seem to follow therefore that she was not a ship of war; for it is not armament but the flag and commission that make a vessel a ship of war. See *Schooner Exchange v. McFaddon*, 7 Cranch (U. S. Sup. Ct.) 116, 146; see also HALL, INTERNAT. LAW, § 44. Accordingly it would seem that the deserter in the principal case should not be considered a deserter from a ship of war within the meaning of the treaty. Yet the man is undoubtedly a deserter from the Russian navy and the question arises whether a different result may be reached on the assumption that the detail of the officer and fifty-three men is a military force entering the country by the permission of the executive. When a military force of another sovereign is permitted to enter or pass through the territory of a state, the force while in the territory is exempt from jurisdiction. WHEATON, INTERNAT. LAW, § 99. The reason of this is obvious. Unless the officers are allowed to exercise the restraints of their own law over their men, the morale of the force may be destroyed. See *Schooner Exchange v. McFaddon*, *supra*. It would follow, then, that the exemption from jurisdiction is enjoyed only so long as the force remains a force. If a man separates from that force, there is no apparent ground to justify recapture by his officer. The law of another country cannot be exercised unless the local sovereign permits, and the permission granted to the force to enter cannot be construed into permission to enforce foreign law beyond the spot where the force is. When the man has deserted, he is like any other person, citizen or alien, subject to local jurisdiction. Desertion from a foreign army or navy is not an extraditable offence, and it would seem that unless it be made so, a deserter should in no case be returned.



**SPECIFIC ENFORCEMENT OF A PAROL PROMISE TO CONVEY LAND. —** The fact that courts of equity in specifically enforcing many classes of parol promises to convey land assign various and not altogether consistent reasons for so doing, raises the inquiry as to the true underlying principle upon which their jurisdiction is based. Where the transaction regarding conveyance takes the form of a bilateral contract, the mere taking of possession by the promisee with the consent of the promisor is generally regarded as sufficient part performance to take the case out of the Statute of Frauds. *Butcher v. Stapely*, 1 Vern. 363. On the other hand, equity will not decree a conveyance where there has been merely a payment of the purchase money. *Britain v. Rossiter*, 11 Q. B. D. 123, 131. If in addition to the taking of possession the promisee has made valuable, permanent improvements, he may demand a conveyance. See POMEROY, SPEC. PERF., § 126. The same principles have also been applied, even where the contracts were unilateral. *Freeman v. Freeman*, 43 N. Y. 34. It seems hardly exact, however, to use the phrase "part performance" in this last type of case. The same act that operates as an acceptance of the offer cannot logically be regarded as also part performance of the contract; for until the act is done no contract exists.

Another form which the transaction may assume is that of a parol gift. This is illustrated in a recent Oregon case. A father told his son that he might have a certain piece of land if he would move on to it and build. The son, relying on the promise, performed the stipulations and was allowed to enforce a conveyance from his father's grantee, who had taken the land with notice. *Scott v. Lewis*, 66 Pac. Rep. 299. The court while citing authorities to sustain the jurisdiction of equity in the case of a parol gift, apparently regarded the original understanding as a contract. In either aspect, however, the result of the decision is amply sustained by authority.

The enforcement of parol gifts shows that the true reason for the rule is not dependent upon any contractual relation; that the theory is not that of the specific performance of contracts. In all the different classes of cases enumerated in which equity has granted relief, with the exception of the first, — viz., where the taking of possession alone was regarded a sufficient part performance to justify a decree — there has existed one common circumstance which probably furnishes the ground for equity jurisdiction. The plaintiff upon the faith of the defendant's promise has entered upon the land of the latter and expended money in improvements, materially changing his position. On the defendant's refusal to convey, the promisee cannot sue on the contract — if it be such a case — because of the statute; and the doctrine of part performance being a purely equitable doctrine, will be of no avail. See POMEROY, SPEC. PERF., § 98. Were he to sue his defaulting promisor in a quasi-contractual action, the measure of his damages would be merely the increment in the value of the land due to his improvements; in most cases an utterly inadequate compensation. Consequently it is eminently just, when the promisee in reliance upon a promise has so changed his position that he can neither be adequately reimbursed nor put in as favorable a position as he occupied before, that equity should then compel a conveyance of the land to him. The cases where the taking of possession is the only act, would seem on principle to fall in the same category as those where only payment of purchase money has been made. The fact that specific enforcement of the promise is granted in the former would seem to be somewhat anomalous.

DOUBLE PUNISHMENT UNDER STATUTE AND ORDINANCE. — Where a municipal ordinance prohibits acts which are also penal offences under the state laws, questions of considerable difficulty arise. That such ordinances may constitutionally be passed is generally, though not universally admitted. COOLEY, CONST. LIM., 6th ed., 239; *cf.* 1 BRACH, PUB. CORP., § 510. Accepting their constitutionality, may the same act be twice punished, once under the ordinance, and again under the statute? Some states hold that it may not; and that the act is punishable alone by that power which first takes jurisdiction. *Lynch v. Commonwealth*, 35 S. W. Rep. 264 (Ky.); see *People v. Hanrahan*, 75 Mich. 611. A recent Missouri case, inconsistent with earlier decisions in the same court, gives a contrary answer. *State v. Muir*, 65 S. W. Rep. 285; *contra*, *State v. Cowan*, 29 Mo. 330. The defendant having been convicted and fined in the police court upon a complaint for violating a city ordinance against gambling, was indicted under a statute for the same act, and his plea of *autrefois convict* held no bar. The prosecution under the ordinance was considered a merely civil proceeding.

This result, though not this reasoning, is in accord with the weight of authority. COOLEY, *supra*; *Hankins v. People*, 106 Ill. 628; *State v. Clifford*, 45 La. Ann. 980. It is usually argued that the single act constitutes two offences, one purely local, against the police regulations of the municipality, the other a violation of the public law. *Mayor v. Allaire*, 14 Ala. 400. An analogy is often drawn to the concurrent jurisdictions of state and federal courts. See *State v. Ambrose*, 6 Ind. 351. This analogy however is unsound, for the municipality is not a distinct sovereign, its only power emanating solely from the state. A more satisfactory reason for allowing such double punishment is advanced when it is said that the constitutional prohibitions against double jeopardy were never intended to apply to conviction under a mere police regulation. *State v. Clifford*, *supra*. This view would seem to find support in those cases which permit conviction for a violation of the ordinance by summary proceedings, when if the act were punished as a violation of the statute indictment and jury trial would be requisite. *Ogden v. Madison*, 87 N. W. Rep. 568 (Wis.); *McInery v. Denver*, 17 Col. 302.

The principal case suggests a third ground on which to support these decisions, namely that the prosecution under the ordinance is not really a criminal proceeding. Such a view is not wholly without support. Where as at common law, the enforcement of the ordinance is by an action of debt for the fine brought in the name of the city, the action is admittedly civil. 1 DILL., MUN. CORP., § 410. But where, as is usual in this country, the proceeding is in the nature of a complaint, the character of the action is much disputed. The cases necessarily turn largely upon the particular wording of the state constitution and statutes. See 33 L. R. A. 33, note. In general it seems to be held that if the violation of the ordinance is also a misdemeanor by statute or common law, the proceeding is criminal; otherwise it is civil. See *State v. Municipal Court of Milwaukee*, 89 Wis. 358. This distinction appears invalid. The character of the violation of the police regulations of the city is not altered by the criminality or non-criminality of the act under the statutes. The true test it is thought rests in the intention of the legislature in authorizing, and of the city in passing such regulations. This is to be gathered from the nature of the act prohibited, the penalty imposed, and the method of procedure. If the purpose of the ordinance is to render reparation to

the city by a fine, the proceeding, even though by complaint, may well be considered civil rather than criminal. On the other hand, if the object is to penalize the offender, it would seem that the proceeding to collect the fine, unless it be an action of debt, and certainly the proceedings to impose a penalty of imprisonment, would be of a criminal character. The statement of the principal case, therefore, that such proceedings are merely civil would seem too broad; yet two convictions may be supported in such cases on the ground above suggested that the constitutional protection against double jeopardy was not intended to extend to punishment for violation of a city ordinance.

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WHAT CONSTITUTES A CLOG ON THE EQUITY OF REDEMPTION? — The principle that an extortionate or oppressive contract is not necessarily enforceable because voluntarily made has been thought especially applicable to money-lending transactions. Accordingly, if the borrower gives security there is a rule that he may repudiate any part of his mortgage agreement that clogs the equity of redemption. Definitions of such an agreement, differing substantially, appear successively in English cases. The original test, whether the mortgagor promises something beside repayment of the loan with interest, was succeeded by one less sweeping, namely, whether the mortgagor's by-agreement makes redemption harder. *Biggs v. Hoddinott*, [1898] 2 Ch. 307. Then it was reasoned that if the mortgage given was a security as well for the performance of any additional agreement as for repayment of the loan, redemption was made no harder because that very agreement became part of the mortgage-obligation. *Santley v. Wilde*, [1899] 2 Ch. 474; see 13 HARV. L. REV. 595. It was problematical whether this decision left any case to which the rule against clogging redemption could apply; for by the admitted test there was no clog unless the burden of redeeming was increased, and by the decision itself agreements which most directly increased that burden were valid as becoming part of the mortgage transaction. Recently the question was neatly raised. A lessee of a public-house mortgaged his term, and purported to bind the land by a covenant to sell there none but the mortgagees' liquors. The incumbrance of the covenant was to exist during the whole term, even after the mortgage was satisfied. This particular stipulation the Court of Appeal held unenforceable, as being without the rule of *Santley v. Wilde*, *supra*, because not secured by the mortgage. *Rice v. Noakes & Co.*, [1900] 2 Ch. 445. The paradox is that if the mortgage had secured the covenant the bargain, though harder than that in the principal case, would have been sustained. The House of Lords, in affirming the decision, chose rather to disapprove *Santley v. Wilde*. *Noakes & Co., Ltd., v. Rice*, [1902] A. C. 24.

The decision has more than the mere effect of weakening the rule in *Santley v. Wilde*. The covenant made redemption no harder, if by redemption is meant obtaining a reconveyance of the term. The judgment, however, interprets redemption in this connection as meaning a reacquisition by the mortgagor of the property in the condition in which he transferred it. The covenant is accordingly held invalid so far as it caused an incumbrance on the land outlasting the mortgage. The technical nature of this result appears in the technical distinctions which it necessitates. A covenant binding land not covered by the mortgage

would be no less onerous than the one under discussion. Presumably, however, such a covenant would be enforced; for the present rule affects only agreements restricting the mortgagor's rights in the particular property he mortgages. In fact, in a decision rendered pending the appeal to the House of Lords in the principal case, the rule was held to be limited to agreements enforceable specifically in equity against that property. *Carritt v. Bradley*, [1901] 2 K. B. 550 (C. A.). The mortgage was of a stockholder's controlling interest in a company. The court sustained the mortgagor's collateral agreement to use this interest always thereafter to secure employment for the mortgagee by the company. There seems to be no true distinction from *Noakes v. Rice*, *supra*, for whether the remedy for breach is equitable or merely legal does not concern a mortgagor who keeps his promise. In one case as much as in the other his use of the property is hampered. A recent Irish case approved in the judgment of the House of Lords in *Noakes v. Rice*, *supra*, does not recognize any such distinction. *Browne v. Ryan*, [1901] 2 I. R. 653.

Whether American courts will have to solve the complexities suggested by these cases and how they may do it is conjectural, for the whole doctrine seems yet undeveloped here. *Cf. Uhlfelder v. Carter's Admr.*, 64 Ala. 527; *Northwestern, etc., Ins. Co. v. Butler*, 57 Neb. 198.

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MEASURE OF DAMAGES ON A CONTRACT WHEN THE DISCHARGED EMPLOYEE GOES TO WORK FOR HIMSELF. — In an action by an employee for breach of the contract of service, the law aims to compensate him for his actual loss. *Goodman v. Pocock*, 15 Q. B. 576. It is, however, his duty, under the doctrine of avoidable consequences, to use reasonable care to reduce his damage by securing other employment; and the amount that he can recover is limited to the difference between what he would have received under the contract, and what he has earned or might with due diligence have earned elsewhere during the term of the employment. *Ream v. Watkins*, 27 Mo. 516; *Dickinson v. Talmage*, 138 Mass. 249. A nice question is presented when the injured party, instead of entering the service of some one else or remaining idle, goes to work on his own account. It has recently been decided that in such a case the amount recoverable is the difference between the contract price, and what must have been paid to another to do the work that the injured party has done in his own business. *Lee v. Hampton*, 30 So. Rep. 721 (Miss.). Only two cases with similar facts have been found. *Huntington v. Ogdensburgh*, 3 How. Pr. (N. Y.) 416; *Harrington v. Gies*, 45 Mich. 374. The first is in agreement with the principal case, while the second allows no deduction whatever. It does not appear in any of these cases whether the total profits of the injured party in his own business were greater or less than the sum that he would have had to pay a servant to take his place in conducting it. If they are greater it is obvious that the surplus ought not to be considered in mitigation of his damages, because he might have invested in the business even if he had continued in the defendant's employ and thus have earned that amount in any event. When this is the case, and also when the profits of the business and the value of his labor are equal, the rule in the principal case produces the correct result, awarding to the injured party the amount of his actual loss. But when the profits are less than the value of his labor the rule

seems to fail. In such a case the loss to the plaintiff is the difference between the contract price and the actual profits, rather than the value of his labor, and that amount he ought to recover. Since the object of the law is to make the injured party whole, it would seem that the true measure of damages in cases of this kind is, the difference between what he would have received under the contract, and the amount that he has earned or might with due diligence have earned elsewhere and which he could not have earned if he had continued in the defendant's service under the contract

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CONCERNING THE SURETY OF A BANKRUPT. — In a recent federal case a creditor had innocently received, by way of preference, part payment of a note which was one of several debts due him. The debtor having become bankrupt, his surety paid the balance due on the note. Though the surety had claims on other debts due to himself, the court ruled that he should pay in the amount of the preference before he could make any proof against the estate, and put no such condition on the creditor. *In re Siegel-Hillman, etc., Co.*, 111 Fed. Rep. 980 (Dist. Ct., E. D. Mo.). The court argues that if the creditor were obliged to refund the preference and accept a dividend from the bankrupt's estate, the surety being solvent would ultimately be obliged to make up to the creditor the full amount of the note, and take a dividend from the estate by way of subrogation. The final result would be the same as if the surety refunded the preference at once, and took his dividend, and since the rights of other creditors would not be affected, the court having equity powers could simplify the means to the end. Section 57 *i* of the Bankruptcy Act provides that if a surety discharge his undertaking to a creditor of a bankrupt "in whole or in part, he shall be subrogated to that extent to the rights of the creditor." This provision is taken to mean that the surety can proceed only by subrogation. Such a suit being in the right of the creditor, the fact that the latter has received a preference, and cannot prove unless it is paid back is a complete defence. *Morgan v. Wordell*, 178 Mass. 350. There seems to be no reason, however, for not allowing proof of the surety's other claims in his own right.

But in addition to this it is difficult to see why the court should care whether the creditor or the surety pays back the preference. The court says that if the creditor does so, the debt will not in equity be considered paid, and the original maker, and consequently the surety co-maker, will still be liable. To support this proposition the court cites *Bartholow v. Bean*, 18 Wall. 635. That case decided merely that a preference which the trustee in bankruptcy could set aside is not the less void because there is a solvent surety on the obligation. In the principal case, as the court agrees, the creditor cannot be deprived of the preference, which he took in good faith. But if he wishes to prove other claims he must refund it. Section 57 *g*. The court ruled in the course of the opinion that the surety need not turn in the amount of a preference to an innocent creditor, on whose claim also he was bound, but all of whose debts had been paid in full by the preference. These two rulings make the surety's release depend on the accident of the creditor having other claims against the principal debtor, and therefore having a motive for surrendering his preference. It is submitted that such other claims, with which the surety has nothing to do, should not be considered in determining his rights.



Since the payment of the preference was in itself unassailable, it should be considered as having at once discharged the surety *pro tanto*. The justice of the holding as to the creditor who had no other claim is apparent. It seems therefore that as to the amount the principal paid to the other creditor, the surety should be discharged, and so cannot equitably be forced to pay it back and take a dividend. If the preference is not restored by one or the other, the surety, of course, cannot recover the amount he has paid on the debt, and the creditor should not be allowed to prove his other debts. If the money is refunded, proof in both these cases is proper. Who shall make the payment would seem under the circumstances a question for the parties to settle among themselves, and a matter of indifference to the court, supplying therefore no ground for intervention.

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**CORONERS' VERDICTS AS EVIDENCE IN SUBSEQUENT TRIALS.**—The office of coroner, though often stated as dating from the statute of Edward I., is apparently of more ancient origin. 1 POLL. & MAIT., HIST. ENG. LAW, 583. His duties are both ministerial and judicial at common law. 1 Bac. Abr., 6th ed., 756. Of these the chief one is to conduct an inquisition before six jurymen into the causes of the death of persons coming to a violent or sudden end within his jurisdiction. Their verdict must be signed and sealed and handed to the proper authorities. In the old days this verdict was held in cases of suicide, or *felo de se*, to be conclusive against the executor of the deceased. 3 CO. INST. 55. And a verdict of acquittal in favor of one accused by the coroner's jury was not received by the judge unless the jury also found who or what had caused the death of the deceased. 13 Edw. IV. c. 3, pl. 7. Lord Hale, however, was of the opinion that this rule was most unjust, and he practically changed the law, making all findings of an inquisition traversable. 1 HALE, P. C., 416, 417. He cited as authority for this a record in the Exchequer, East 45 Edw. III., where the jury found adversely to the inquisition. A refinement appears later that the finding a deceased not *felo de se* is not traversable, nor a *fugam fecit*, though the affirmative finding is. 1 Wms. Saund. 663. And lunacy and *post mortem* inquisitions are somewhat similarly treated, being considered as good evidence, but not conclusive. *Sergeson v. Sealey*, 2 Atk. 411; *Burridge v. Lord Sussex*, 2 Raym. 1292.

The modern law draws a distinction between inquisitions of lunacy, of office, etc., and coroners' inquests. The former are generally considered as admissible evidence, but not conclusive. *Stokes v. Dawes*, 4 Mass. 268. The principle of their admissibility is apparently that they are matters of public and general interest, and have peculiar guaranties for accuracy and fidelity. GREENL., EV., 15th ed., § 556. One authority considers them similar to judgments *in rem*, in that they are equally admissible against strangers as well as parties, but dissimilar in that they are not conclusive against anybody. 2 TAYL., EV., 6th ed., § 1487. The distinction noted seems clearly tenable on the ground that inquisitions determine *status*, whereas coroners' inquests find facts. The law with regard to the latter proceedings is in square conflict. In civil suits some courts have admitted the verdict in evidence as the result of proceedings of a judicial nature, or as the act of a public officer under official oath and in discharge of a public duty. *Lancaster v. Mishler*, 100 Pa. St. 624; *United States, etc., Ins. Co. v. Vocke*, 129 Ill. 557. But

in similar actions an opposite result has been reached as a matter of policy, and on the ground that the duty was not a judicial one. *Insurance Co. v. Lewin*, 24 Col. 43; *State v. County Com'rs*, 54 Md. 426. In criminal cases the law, though meagre, is to-day practically universal that the verdict of a coroner's jury is inadmissible at the subsequent trial, even as *prima facie* evidence. *Crisfield v. Perine*, 15 Hun (N. Y.) 200; *Colquit v. State*, 64 S. W. Rep. 713 (Tenn.). Yet in Louisiana the verdict, though not competent as proof of crime, is admissible to show the fact of the deceased's death. *State v. Parker*, 7 La. Ann. 83. And in at least one jurisdiction depositions taken before the coroner are admissible to impeach the credibility of a witness. *People v. Devine*, 44 Cal. 452.

The exclusion of this form of evidence seems proper. It is purely hearsay, and is the mere opinion of a lot of men hurriedly gathered together, who have not time to look into the facts carefully, and who have had only slightly better opportunities of discovering the truth than the trial jury itself. Lastly, it is peculiarly dangerous, being much open to abuse by the jury. It is a temptation to them to use some other men's judgment instead of their own. A sound policy removes all such temptations from the jury whenever possible.

INTERFERENCE WITH LIGHT AND AIR BY ELEVATED RAILROADS. — In a recent decision the New York Court of Appeals reached a conclusion seemingly inconsistent with the position of that court in the famous elevated railway cases. An action was brought for injury to the plaintiff's easements of light and air by the operation of the defendant's railroad upon an elevated structure in Park Avenue, New York City. The defendant had acquired the right to run its trains in front of the plaintiff's property in a depressed cut through the centre of Park Avenue. In 1892 the State Legislature enacted a bill providing for the erection of a viaduct upon which the defendant's trains should be operated and the filling in and opening up of the depressed cut for general street purposes. The work was to be done under the direction of a board appointed by the mayor, one half of the expense being paid by the defendant and the remainder raised by assessment upon property benefited. The defendant was directed to run its trains upon the structure when completed. Pursuant to this act the viaduct was erected and in 1897 the defendant began running its trains upon it. The plaintiff claimed damages for the injury to his light and air from that date. By a divided court recovery was denied. *Fries v. N. Y. & H. R. R.*, 169 N. Y. 270. The position taken by the prevailing opinion was that the injury to the plaintiff arose in consequence of the grading of the street and was therefore *damnum absque injuria*; that the injury was caused by the act of the state and not by that of the defendant; and, finally, that if the defendant in operating its trains trespassed upon the property rights of the plaintiff the proper remedy was an attack upon the constitutionality of the act, which question could not be raised for the first time in the Court of Appeals.

The decision seems inconsistent with the established New York doctrine that an injury to easements of light and air by the operation of an elevated railroad constitutes a taking of property within the meaning of the constitution. *Story v. N. Y. El. R. R.*, 90 N. Y. 122. The improvement in question is obviously something more than the grading of a

street; it is both a grading and the erection of an elevated structure for the passage of railroad trains. But even if it be treated as a grading the judgment is inconsistent with an earlier decision that the raising of a street grade for the exclusive use of a railroad is within the principle of the *Story* case, *supra*. *Reining v. N. Y., L. & W. R. R.*, 128 N. Y. 157. Upon the point that the erection of the viaduct is the act of an agent of the state for which the defendant cannot be held liable the decision is squarely in conflict with an earlier decision by the same court upon substantially the same facts. *Lewis v. N. Y. & H. R. R.*, 162 N. Y. 202. But assuming the soundness of the present position as to liability for the erection of the viaduct, there remains the injury to the plaintiff's easements by the operation of the defendant's trains upon the structure and for that injury the doctrine of the *Story* case provides a recovery. The suggestion, of the court that the statute is unconstitutional if obedience thereto involves a trespass, violates the established rule of construction that regulations of public corporations requiring the taking by them of private property do not imply a taking without compensation. *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. (N. Y.) 162. The decision under discussion leaves the law of New York in a curious condition. The state may authorize steam railroad companies to run trains through the public streets without compensation to abutters not owning the fee. *Fobes v. R., W. & O. R. R.*, 121 N. Y. 505. Once established there, according to the principal case, they may be authorized to run their trains upon elevated structures without compensation. Thus, indirectly, may be reached a result that under the doctrine of the *Story* case amounts to a violation of the constitutional provision against the taking of property without compensation.

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LIABILITY OF A VENDOR FOR NEGLIGENCE IN THE SALE OR CONSTRUCTION OF A CHATTEL. — Does the negligence of a vendor in selling a defective chattel render him liable to other than his immediate vendee? A recent Rhode Island decision has added another jurisdiction to those answering this question in the negative. *McCaffrey v. Mossberg, etc., Mfg. Co.*, 50 Atl. Rep. 651. The plaintiff, an employee of a manufacturing jeweller, was injured by the breaking of a drop press negligently constructed by the defendant, and sold by him to the jeweller. Recovery was denied on the ground that no duty of care was owed by the defendant to the plaintiff.

The authorities almost unanimously accord, the decisive arguments being an absence of duty to the plaintiff, a break in the chain of legal causation, and the multiplicity of suits thought likely to result if the action were allowed. *Curtin v. Somerset*, 140 Pa. St. 70; *Bragdon v. Perkins-Campbell Co.*, 87 Fed. Rep. 109. But *cf. Glenn v. Winters*, 40 N. Y. Supp. 659. On the other side, it is argued that the natural consequence of putting a defective article on the market is injury to whoever uses that article, and that under modern conditions such person is generally not the first vendee but his servant or sub-vendee, to whom a duty of care is consequently owed; that the rule of "natural and probable consequences" should determine the class of persons who may claim reparation, as well as the kind of physical damage for which compensation may be obtained. See 16 L. QUART. REV. 168. This argument finds support chiefly in certain analogous classes of cases where



such a duty of care, quite apart from the contract, is recognized as existing towards strangers to the contract. It is admitted to exist when the article sold is "imminently dangerous," such as poisonous drugs, though the rule is not always confined to such goods. *Thomas v. Winchester*, 6 N. Y. 397; see *Bright v. Record Co.*, 88 Wis. 299. So also in implied invitation cases. *Heaven v. Pender*, L. R. 11 Q. B. 503. When under a traffic agreement one railroad company negligently furnished another a defective car by which a servant of the latter was injured, recovery was allowed on the ground that the defendant railroad must have foreseen that the car would be operated by employees, and consequently owed them the duty of care. *Pa. R. R. Co. v. Snyder*, 55 Oh. St. 342; *Teal v. American Mining Co.*, 87 N. W. Rep. 837 (Minn.); cf. *Caledonian Ry. Co. v. Mulholland*, [1898] A. C. 216. The same reasoning seems equally applicable to the principal case. But courts have refused to apply this doctrine to the sale of machinery. *Heizer v. Mfg. Co.*, 110 Mo. 605. The vendor, however, is held liable if he knows of the defect in the article; and in a few instances he has been so held on the ground of negligent misrepresentation where he failed to know of the defect through carelessness. *Lewis v. Terry*, 111 Cal. 39; *Blood Balm Co. v. Cooper*, 83 Ga. 457; cf. *George v. Skivington*, L. R. 5 Ex. 1.

These several classes of transactions in which the defendant's liability, apart from contract, is admitted, seem to point to a general principle, large enough to include the principal case, namely that one who puts articles on the market owes the duty of care to all those persons who ought reasonably to have been foreseen as likely to use them. See *Bishop v. Weber*, 139 Mass. 411. The tendency of modern decisions is certainly to extend liability for negligence in this direction. The extension suggested would be the logical consequence of those already made.

The cases which rest liability upon misrepresentation suggest the question how far an actual reliance upon the defendant's misrepresentation is necessary to the plaintiff's suit. If the action is treated strictly as an action for misrepresentation actual reliance is essential. But under such interpretation the rule of *Blood Balm Co. v. Cooper*, *supra*, would be of narrow application. A servant using his master's machine doubtless assumes that some one has taken care to have it suitable for the intended purpose, but he certainly does not consciously rely on an implied representation to that effect by the maker. The cases lay little stress on this element of actual reliance. Nor does it appear why such reliance should be of more importance here than where the liability is rested upon an implied "invitation" or the "imminently dangerous" nature of the goods.

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THE PROTECTION OF INTERESTS ACQUIRED UNDER AN OVERRULED DECISION. — It is axiomatic that the courts, applying the principle of *stare decisis*, will not overrule a line of decisions, or even a single decision which has been acted upon as a rule of property, except for the strongest reasons. But what is the effect when such a decision is overruled? It has been held by the Supreme Court in applying state law, that they will not follow a state decision overruling a line of decisions, in reliance on which the parties to the suit have made commercial contracts. *Gelpcke v. Dubuque*, 1 Wall. 175. This is perhaps due to the fact that the court's jurisdiction is for the protection of citizens of other states. See 4 HARV.

L. REV. 311. A question of this sort, not involving federal jurisdiction, arose in Pennsylvania recently. The Supreme Court of the state had in 1846 decided that precatory words after an absolute bequest of personalty created a trust. *Coates' Appeal*, 2 Pa. St. 129. The case was remanded to the lower court and finally in 1853 again came before the Supreme Court, which overruled the first decision and held that no trust was created. *Pennock's Estate*, 20 Pa. St. 268. Between these two dates, the will in question in the principal case had been made and the testator had died. It was held on probate that in construing the precatory clause contained in the will, the rule in *Coates' Appeal* was to be applied and not that in *Pennock's Estate*. *Lisle's Estate*, 58 Leg. Intel. 490 (Orphans' Ct.).

The principal case being in a lower court is perhaps of not much weight in a question of this sort, but a similar doctrine has been before suggested in Pennsylvania. *Menges v. Dentler*, 33 Pa. St. 495; see also *Geddes v. Brown*, 5 Phila. 180. And in New York a creditor who refused a tender of greenbacks after the United States Supreme Court had decided that the legal tender acts were unconstitutional and before that decision was overruled was protected. *Harris v. Jex*, 55 N. Y. 421; *Stockton v. Dundee, etc., Co.*, 22 N. J. Eq. 56, *contra*. Cf. *Harbert v. Monongahela River R. Co.*, 40 S. E. Rep. 377 (W. Va.).

The view of Blackstone that the court never makes law, but simply declares what it has always been, at first sight would seem inconsistent with such a doctrine, since an overruled decision, he would say, never was law at all. The inconsistency is more apparent than real, however, since it is not necessary, if the doctrine be made to rest simply on grounds of sound policy, to say that the overruled decision was law at any time. 1 BL. COM. 70. Blackstone's view, moreover, has been criticised by Austin and others, and as a matter of historical fact it must be said that the judges in some sense do make law. 2 AUSTIN, JUR., 4th ed., 655; see 5 HARV. L. REV. 172. But will the courts protect rights which have accrued under a decision which has been overruled? The solution must depend on considerations of expediency and sound policy. Obviously justice in particular cases would result from such protection; but some difficulties are suggested. It is said that the courts, as a logical conclusion, will be precluded from overruling a decision involving a rule of property where the rights of the parties to the suit have accrued since that decision, without preserving the rights of those parties; and that, if such rights are preserved, it is practically a moot case, since no others are before the court. Practical difficulties may also arise in the application of the doctrine. See 9 AM. L. REV. 381, 408. These objections are serious, but perhaps not insuperable. The court while following the prior decision could by means of a *dictum* give notice that it would not do so in future; and consequently, on rights accruing after their notice, could squarely overrule the prior decision. If the doctrine is to be applied, it must rest largely in the discretion of the court when it is to be applied and where the line is to be drawn. Thus as intimated above it is a question of sound policy, and it may perhaps be doubted whether the disadvantages of confusion and uncertainty would not more than offset the benefit to the few, whose rights are protected. It would seem, however, that the court should follow the prior decision, if at all, only where the parties have actually relied on it, or may be reasonably presumed to have done so.

## RECENT CASES.

**BANKRUPTCY — PREFERENCES — EFFECT OF NEW CREDITS AND PARTIAL PAYMENTS.** — A creditor, ignorant of his debtor's insolvency, advanced goods from time to time, and received partial payment for each advance about a month later. The total effect of these transactions was that the debt had increased at the time of bankruptcy. *Held*, that these payments need not be surrendered as preferences under § 57 *g*, before proof of other claims can be made. *In re Dickson*, 111 Fed. Rep. 726 (C. C. A., First Circ.).

The court holds that though the fact that the payments were received innocently would not by itself prevent their being preferences which must be surrendered as a condition of making proof, yet regarding not simply each payment, but the whole course of dealing and the increase of the debt, they were not such as § 57 *g* was intended to include. Such a decision seems obtainable only by reading in an exception not expressed in the Act, which makes no distinction in this respect as to preferences under different circumstances. Nevertheless, any other construction would work immense hardship to innocent preferred creditors who often could not afford to prove. The provision on this point is a new one in bankruptcy legislation, and apparently an unpopular one, to avoid which the cases indicate that many judges are willing to strain a point. *Cf. McKey v. Lee*, 105 Fed. Rep. 923, and the dissent of four judges in *Pirie v. Chicago, etc., Co.*, 182 U. S. 438; and see 15 HARV. L. REV. 232. It seems very probable therefore that the decision of the principal case will stand.

**BANKRUPTCY — PREFERENCES TO CREDITOR — RIGHTS OF SURETY.** — A creditor received preferences on one of his claims from an insolvent, the creditor being ignorant of the insolvency. On the bankruptcy of the debtor, his surety on this debt paid the rest of it. The creditor and the surety each had other claims against the estate, which they wished to prove. *Held*, that the court may transfer from the creditor to the surety the obligation to refund the preferences, as a condition of making proof. *In re Siegel-Hillmon, etc., Co.*, 111 Fed. Rep. 980 (Dist. Ct., E. D. Mo.). See NOTES, p. 663.

**BANKRUPTCY — SURRENDER OF PREFERENCES — SET-OFF OF NEW CREDITS.** — A creditor, having innocently received certain preferences, made further unsecured advances in good faith. The Bankruptcy Act, § 60*b*, provides for recovery by the trustee of preferences received with notice, and § 60*c* allows such advances as those here in question to be set off by a preferred creditor "against the amount which would otherwise be recoverable from him." *Held*, that such advances may be set off against the amount of preferences received *bona fide*, which the trustee could not force to be returned, but which by § 57 *g* must be surrendered before other claims are provable. *Peterson v. Nash Bros.*, 112 Fed. Rep. 311 (C. C. A., Eighth Circ.).

To construe "the amount . . . recoverable" to mean "the amount not recoverable, but which must be surrendered in order to prove other claims," seems rather far fetched. It is urged that any other construction would give the creditor who receives a preference knowingly and resists its repayment, an advantage over the innocent preferred creditor who cannot be sued. It has been held, however, that one who has knowingly received a preference which the trustee recovered only by suit, has not "surrendered" so as to be able to prove in the bankruptcy proceedings. *In re Owings*, 109 Fed. Rep. 623; see 15 HARV. L. REV. 314. Like the innocent creditor, then, the creditor who has knowingly been preferred must make a voluntary surrender, and in doing so, since there is no provision as to set-off in connection with surrenders, he stands on exactly the same footing as the innocent creditor. It is therefore hard to see how the latter is at a disadvantage, and consequently the strained construction which the court puts on the Act is not easy to justify. In accord with the principal case is *McKey v. Lee*, 105 Fed. Rep. 923 (C. C. A.). For district court decisions on both sides, see *In re Southern, etc., Co.*, 111 Fed. Rep. 518.

**BILLS AND NOTES — NEGOTIABLE INSTRUMENTS LAW — NOTE IMPROPERLY DELIVERED WITH NAME OF PAYEE OMITTED — BLANK CHARGING PURCHASER WITH NOTICE.** — The defendant, as surety for one G., signed a promissory note with the

name of the payee left in blank, on the understanding that the note should be made payable to one of two banks in taking up a previous note. G. sold the note to the plaintiff who, acting throughout in good faith, took for value and later filled in his own name. The Negotiable Instruments Law, § 14, provides that such a note, if not filled up in accordance with the original authority, cannot be enforced unless after completion it is negotiated to a holder in due course. *Held*, that the plaintiff cannot recover since the note was not negotiated to him "after completion." *Guerrant v. Guerrant*, 7 Va. L. Reg. 639 (Va., Corp. Ct.).

At common law a maker or a surety who issues an incomplete note, gives implied authority to fill the blanks, and is liable to a *bona fide* holder for value though the actual authority given has been exceeded. *Bank of Pittsburg v. Neal*, 22 How. (U. S. Sup. Ct.) 96. The American courts applied this rule when such a holder took the note before completion and filled the blanks in good faith in excess of the original authority. *Fullerton v. Sturges*, 4 Oh. St. 530; *cf. Huntington v. Branch Bank*, 3 Ala. 186. The English doctrine was that a blank charged the purchaser with notice and that he must at his peril ascertain the extent of the authority conferred. *Aude v. Dixon*, 6 Exch. 869. By the insertion of the words "after completion" the English rule was incorporated in the Bills of Exchange Act, § 20, and in our law, whose provision is identical, and the decision of the court seems therefore clearly correct. There apparently have been no previous decisions on the point under these Acts. According to the rather unsatisfactory ruling of a recent English decision, the plaintiff in the principal case would be barred on the further ground that the note was not "negotiated" to him. *Herdman v. Wheeler*, 18 T. L. R. 190 (K. B.). See 15 HARV. L. REV. 579.

**BILLS AND NOTES — THEFT BEFORE DELIVERY — ESTOPPEL BY NEGLIGENCE.** — The person named as payee in a paper in the form of a note, made by the defendant for amusement, abstracted it from other papers during the defendant's absence from the room, and afterwards negotiated it to the plaintiff, an innocent purchaser. *Held*, that the defendant is not liable on the note. *Salley v. Terrill*, 50 Atl. Rep. 896 (Me.).

A contrary result has been reached in some similar cases. *Shipley v. Carrol*, 45 Ill. 285. There being no delivery, however, the note has never had any legal inception, and the maker should not be held liable, unless he is estopped by negligence to deny delivery. *Burson v. Huntington*, 21 Mich. 415. There is some ground to contend that the defendant here was negligent in leaving the instrument in the same room with the payee, but it is doubtful if this is sufficient to constitute negligence. It was not so considered in *Burson v. Huntington*, *supra*. A maker who leaves paper payable to bearer in a public place would, however, probably be estopped to dispute delivery. Cases dealing with bank notes and treasury notes, where liability exists regardless of the care used, may be distinguished as resting on grounds of public policy. The issuance of such instruments is authorized with the intention that they shall pass from hand to hand as currency, and the public in treating them as such must be protected. See *Worcester County Bank v. Dorchester, etc., Bank*, 10 Cush. (Mass.) 488; *Cooke v. United States*, 91 U. S. 389.

**CARRIERS — AGENCY — LIABILITY FOR INSULT TO PASSENGERS.** — A railway conductor impliedly accused a passenger, in the hearing of other passengers, of dishonesty in trying to evade the payment of fare. Action was brought against the railway company for the humiliation caused thereby. *Held*, that the company is liable. *Texas & Pac. Ry. Co. v. Tarkington*, 66 S. W. Rep. 137 (Tex., Civ. App.).

This case illustrates very neatly the peculiar liability of the carrier of passengers. The language used by the conductor was not actionable *per se* nor was such special damage shown as would ground an action for slander. Obviously, then, under the ordinary circumstances of life, recovery could not be had either from the agent or from his employer. A common carrier, however, has from the earliest times been bound to use the utmost care and vigilance to guard the safety of his passengers. Gradually the duty of guarding against violence grew to include protection against such abusive and insulting language and disorderly conduct as could reasonably be foreseen. See *Chicago, etc., R. R. Co. v. Flexman*, 103 Ill. 546; *Putnam v. Broadway, etc., R. R. Co.*, 55 N. Y. 108. Accordingly the carrier is properly held liable where one of his servants fails to prevent such conduct, when, by reasonable diligence, he might do so. This liability clearly includes cases of improper conduct by the servants themselves. Hence recovery has been had against the carrier for assaults by his servants, even where the servants' acts had no connection whatsoever with their employment. *Craker v.*

*Chicago & N. W. Ry. Co.*, 36 Wis. 657; *Goddard v. Grand Trunk Ry.*, 57 Me. 202. The principal case, then, would seem to be merely a further application of the recognized doctrine.

CONSTITUTIONAL LAW — EMINENT DOMAIN — EASEMENTS OF LIGHT AND AIR — ELEVATED RAILROADS. — A steam railroad company had acquired the right to run its trains through the street in front of the plaintiff's premises. In accordance with a legislative scheme for the improvement of the street, the railroad tracks were raised upon an elevated structure and the trains operated thereon. The plaintiff sued the railroad company for injury to his easements of light and air. *Held*, that he cannot recover. *Fries v. New York & H. R. R.*, 169 N. Y. 270. See NOTES, p. 665.

CONTRACTS — PAST CONSIDERATION — IMPLIED PROMISE. — The plaintiff, at the defendant's request, supported the defendant's mother during an illness. Subsequently the defendant promised to pay the plaintiff for his services. *Held*, that a declaration based on this promise is good on demurrer. *Montgomery v. Downey*, 88 N. W. Rep. 810 (Ia.).

In early times it was thought that a promise was sufficiently supported by the consideration of a detriment already incurred by the promisee at the request of the promisor. *Anon.*, cited in *Hunt v. Bate*, Dyer 272; *Lampleigh v. Brathwaite*, Hob. 105. While these cases have never been expressly overruled, they seem to have been entirely discredited by the rejection of the doctrine of past consideration. *Cf. Hopkins v. Logan*, 5 M. & W. 241. The old rule is still laid down by some text-writers and in *dicta* in various jurisdictions. See 1 PARSONS, CONTS., \*469; *Dearborn v. Bowman*, 3 Met. (Mass.) 155, 158; *contra*, ANSON, CONTS., 9th ed., 102 *et seq.* It has influenced not only the principal case, but several other modern American decisions where the declaration was on the subsequent express promise. *Pool v. Horner*, 64 Md. 131; *Stuht v. Sweesy*, 48 Neb. 767. In most of these cases, however, the subsequent promise was coextensive with the promise which the facts would imply, and in all, it is believed, a *quantum meruit* would have been supported. In such cases practically the same result would be achieved by the modern doctrine of implied promises, and so the survival of the old principle seems to affect only the form of the declaration and in some cases, perhaps, the amount of damages awarded. See *Ex parte Ford*, 16 Q. B. D. 305, 307.

CORPORATIONS — BY-LAWS — DIVERSION OF MORTUARY FUND INTO HANDS OF MEMBERS. — In pursuance of a charter amendment, the defendant corporation passed a by-law providing for assessments from time to time to make up a mortuary fund to be paid to widows and children of deceased members. Later a new by-law was passed modifying the system and providing, *inter alia*, for the distribution of the accumulated fund among the subscribing members. *Held*, that the new by-law is invalid. *Parish v. New York Produce Exchange*, 169 N. Y. 34.

The authorities on this subject are in hopeless conflict and confusion. See BOISOT, BY-LAWS, §§ 118-131. All by-laws must be reasonable and within the chartered powers of the corporation, but beyond this it is well-nigh impossible to lay down any definite principles. Vested rights cannot be impaired, but the cases differ widely as to what constitutes a vested right. See *Stohr v. San Francisco Musical Fund Society*, 82 Cal. 557. The interest of each member in the mortuary fund is acquired with reference to the charter and by-laws of the corporation, and the latter are naturally subject to considerable modification by by-laws later passed in the way of amendment. See *Pain v. Société St. Jean Baptiste*, 172 Mass. 319; but *cf. Becker v. Berlin Beneficial Society*, 144 Pa. St. 232. The subscribing members, however, clearly acquire some rights in the fund, and their interest, though a limited one, entitles them to insist that the fund be kept within the general scope of the purpose for which it was collected and not otherwise disposed of or diverted into new channels. *Cf. Lloyd v. Supreme Lodge K. of P.*, 98 Fed. Rep. 66; *Bergman v. St. Paul Mut. Bldg. Assoc.*, 29 Minn. 275. A sweeping amendment like the one in question seems therefore sufficient to give a right of action.

CORPORATIONS — CONSOLIDATION — TRANSFER OF ENTIRE PROPERTY TO ANOTHER CORPORATION — RIGHTS OF CREDITORS. — *Held*, that a corporation formed by consolidation is liable at law for the debts of each constituent corporation, at least to the extent of the assets received. *Morrison v. American Snuff Co.*, 30 So. Rep. 723 (Miss.).



All the property of one corporation was transferred to another, which took with notice of certain liabilities of the former corporation. *Held*, that the property is chargeable in equity for those liabilities. *Vicksburg, etc., Co. v. Citizens', etc., Co.*, 30 So. Rep. 725 (Miss.).

When one corporation transfers all its property to another distinct corporation, and in consideration therefor the shareholders of the first are made members of the second, creditors of the first are in almost every jurisdiction given, both in equity and at law, relief against the second, and this, too, in the absence of statute or express agreement between the corporations. *Harrison v. Arkansas Valley Ry. Co.*, 4 McCrary (U. S. Circ. Ct.) 264; *Cleveland, etc., Ry. Co. v. Prewitt*, 134 Ind. 557; see 14 HARV. L. REV. 531. The grounds for relief are generally, however, not satisfactorily developed. When fraudulent as to creditors the conveyance may, of course, be set aside. *Hurd v. New York, etc., Co.*, 167 N. Y. 89. But usually, it would seem, the intention is that the second corporation shall assume the debts of the first. Then equitable relief may be justified on the ground that the assets of the first corporation are to be considered as transferred with the obligation attached, so that the second corporation holds them subject to a trust for creditors; or an action at law may be based on a promise to assume the debts, implied in the agreement between the corporations, the creditors being allowed to sue as beneficiaries on the principle of *Lawrence v. Fox*, 20 N. Y. 268. Consistently with this latter suggestion, the creditor's right at law against the second corporation has been denied in Massachusetts, where *Lawrence v. Fox, supra*, is not followed. *Ewing v. Composite, etc., Co.*, 169 Mass. 72.

**CORPORATIONS — VOIDABILITY OF CONTRACTS IN WHICH DIRECTORS OR OFFICERS HAVE A SPECIAL INTEREST.** — Corporation A, acting through its general manager, who was also largely interested in corporation B, made a series of contracts with the latter corporation. The court found that the contracts were fair. *Held*, that they will not be set aside at the suit of corporation A. *Aldine Mfg. Co. v. Phillips*, 88 N. W. Rep. 632 (Mich.).

The rule is well settled that one acting for another in a fiduciary capacity cannot make a valid contract where he has a substantial interest conflicting with his duties. See *New York, etc., Co. v. National, etc., Co.*, 14 N. Y. 85, 91. When the directors of a corporation make a contract in which some of them have a special interest, that individual interest is almost always to some extent opposed to the duty of the directors acting as a board. A few cases accordingly allow the corporation to avoid the contract, without regard to the number of interested directors. *Aberdeen Ry. Co. v. Blaikie*, 1 Macq. 461. But many courts are not anxious to hamper all dealings between corporations having some directors in common, and will not generally set aside a fair contract when the directors in common form a minority, and the adverse interest is consequently of less effect. See *Jesup v. Illinois Central R. R. Co.*, 43 Fed. Rep. 483; *United States, etc., Co. v. Atlantic, etc., R. R. Co.*, 34 Oh. St. 450. When, however, as in the principal case, the contract is made by a single officer or other agent of the corporation, having a special interest, it is clearly voidable according to the general rule and the decisions in point. *Greenwood, etc., Co. v. Georgia, etc., Co.*, 72 Miss. 46.

**CRIMINAL LAW — FORMER JEOPARDY — MUNICIPAL ORDINANCE AND STATE STATUTE.** — The defendant, having been convicted and fined for violation of a city ordinance against gambling, was indicted for the same act as a violation of a state statute. *Held*, that a plea of former jeopardy is without merit, the prosecution under the ordinance being in the nature of a civil proceeding. *State v. Muir*, 65 S. W. Rep. 285 (Mo.). See NOTES, p. 660.

**CRIMINAL LAW — SOLICITATION — ATTEMPT — JURISDICTION.** — The prisoner wrote in London a letter to B in Johannesburg, soliciting murder. There was no evidence of the receipt of the letter. He was indicted under 24 & 25 Vict., c. 100, § 4, which makes it a misdemeanor to "solicit, encourage, persuade, or endeavor to persuade," or to "propose to" another to commit murder. There were counts for the substantive offence, and also for an attempt. *Held*, that the jury may convict on the latter counts, but to sustain the former there must be evidence of communication. *Rex v. Krause*, 18 T. L. R. 238 (Cent. Crim. Ct.).

The decision that the solicitation was incomplete seems correct. *Regina v. Fox*, 19 W. R. 109 (Ir.). The court allowed the counts for attempt on the assumption, probably, that the complete offence would be indictable in England. It would seem,

however, that the criminal act in such cases is the communication, which would have been in another jurisdiction, and that, consequently, any indictment must have been brought there. This view is supported by at least one class of cases,—where forgeries are uttered by mail. *Lindsey v. State*, 38 Oh. St. 507. But the contrary might be held on analogy to cases of libel by mail, where the jurisdiction is concurrent. *Rex v. Burdett*, 4 B. & Ald. 95. If the completed offence would have been cognizable only abroad, a question arises as to indicting the attempt in England. It would seem that acts sufficient in themselves to constitute an attempt, done in pursuance of a criminal end, are properly indictable where done, even though the offence when completed would be against another sovereignty. Such was the holding in the only case found where the point has been decided. *State v. Terry*, 109 Mo. 601. Cases of accessory in another jurisdiction, and of conspiracy to commit crime abroad, lead by analogy to the same conclusion. *State v. Chapin*, 17 Ark. 561; *People v. Arnold*, 46 Mich. 268.

**DAMAGES—CONTRACT OF SERVICE—SERVANT WORKING FOR HIMSELF AFTER DISMISSAL.**—The plaintiff, a plantation foreman, was under contract with the defendant for a year at \$500. Having been wrongfully discharged, he leased a farm and managed it during the rest of the year, making \$100. *Held*, that the measure of damages in an action on the contract is the contract price, decreased by the amount that the plaintiff must have paid another to do the work which he did on the leased farm. *Lee v. Hampton*, 30 So. Rep. 721 (Miss.). See NOTES, p. 662.

**DAMAGES—MITIGATION—ASSAULT AND BATTERY—PROVOCATION.**—In an action for assault and battery the defendant offered to prove in mitigation of damages threats made by the plaintiff. *Held*, that the evidence is inadmissible. *Mangold v. Ost*, 88 N. W. Rep. 507 (Neb.).

The decision goes on the ground that the threats, if proved, would have no legitimate bearing on the case. It is almost universally agreed that evidence of threats or provocation is admissible in mitigation of exemplary damages. *Corcoran v. Harran*, 55 Wis. 120. But some jurisdictions refuse to allow such evidence to mitigate compensatory damages, on the ground that to do so would virtually be to allow it to be used as a defence to the action. *Scott v. Fleming*, 16 Ill. App. 539; *Prentiss v. Shaw*, 56 Me. 427. It would seem, however, that evidence of this nature has a direct bearing on the actual damage; for, if the plaintiff provoked the assault, there is naturally less outrage and injury to his feelings than if he had been entirely blameless in the matter, and consequently his actual damage is less. In accordance with this view many jurisdictions admit the evidence in mitigation of both exemplary and compensatory damages. *Parker v. Coture*, 63 Vt. 155; *Robison v. Rupert*, 23 Pa. St. 523. It must always appear, of course, that the assault was committed under the immediate influence of the provocation. *Keiser v. Smith*, 71 Ala. 481.

**EVIDENCE—ADMISSIBILITY—VERDICT OF CORONER'S JURY.**—At a trial for murder, the prosecution introduced as evidence the verdict of the coroner's jury that the defendant had killed the deceased, and that "said killing was in our opinion, a cold-blooded murder." *Held*, that the evidence was incompetent. *Colquit v. State*, 64 S. W. Rep. 713 (Tenn., Sup. Ct.). See NOTES, p. 663.

**EVIDENCE—DECLARATIONS AS TO BOUNDARY MADE POST LITEM MOTAM.**—At a trial of a boundary dispute, proof was offered of declarations as to the location of the boundary, which were made by an old resident in the neighborhood, since deceased. The declarations were made after the dispute arose. *Held*, that the evidence was properly rejected. *Hamilton v. Smith*, 50 Atl. Rep. 884 (Conn.).

The admission of pedigree and public interest declarations manifests the ancient practice of proving certain facts by hearsay traditional in the family or community. The American practice, recognized in the principal case, of admitting declarations as to private boundary, had the same origin. THAYER, CAS. EV., 2nd ed., 418, 419; *Higley v. Bidwell*, 9 Conn. 446. In accordance with a decision rendered a century ago, pedigree declarations are inadmissible if made after the controversy which is before the court arose, the declarant being considered as probably voicing then his individual opinion rather than family reputation, or perhaps as collusively making evidence. *Berkeley Peerage Case*, 4 Camp. 401. A similar decision as to public interest declarations followed immediately. *Rex v. Cotton*, 3 Camp. 444. The rule in the principal case follows not unnaturally. Generally, however, declarants as to private boundaries

must have been disinterested, and in many jurisdictions specially informed. *Porter v. Warner*, 2 Root (Conn.) 22; *Clements v. Kyles*, 13 Grat. (Va.) 468, 478. These restrictions, treating the declarant rather as an unsworn witness, testifying of his own knowledge, involve an abandonment of the old conception of him as the mouthpiece of tradition. See *Moseley v. Davies*, 11 Price 162, 167, 174. These methods of insuring genuineness might be considered complete substitutes for the *ante litem motam* condition; but they have not been so considered, and one decision and many *dicta* support the principal case. *Den v. Sugg*, 2 Dev. & Bat. (N. C.) 515.

**EVIDENCE — HUSBAND AND WIFE — COMPETENCY AS WITNESSES AFTER DIVORCE.** — The defendant in the presence of his wife committed an assault on one G. Held, that the wife after divorce can testify against him. *Commonwealth v. Leisey*, 59 Leg. Intel. 48 (Pa. Dist. Ct.).

In general the incapacity of husbands and wives to be witnesses for or against each other is terminated by death or divorce. Public policy obviously requires, however, that it continue in some measure as to matters which occurred during the marriage. In England the prohibition lasts as to all which took place during the coverture and to which the wife could not have testified at the time. *O'Connor v. Marjoribanks*, 4 Man. & G. 435. The American cases show a wide variation, but the most common statement is that the wife remains incompetent against her husband as to knowledge obtained through the confidence of the marriage relation. *Walker v. Sanborn*, 46 Me. 470; *Babcock v. Booth*, 2 Hill (N. Y.) 181. The incompetency has been generally extended to matters such as that in the principal case, affecting the character of the former husband, either as coming under the rule last stated or as a separate class. *State v. Jolly*, 3 Dev. & Bat. (N. C.) 110; cf. *French v. Ware*, 65 Vt. 338; *contra*, *Chamberlain v. People*, 23 N. Y. 85. It is sufficiently probable that the wife's prejudicial knowledge of such matters was allowed to reach her in that confidence which the law protects, to make the application of an absolute rule of incompetency seem on the whole wise and just.

**INSURANCE — POLICY TAKEN OUT BY INSURED — RESULTING TRUST.** — The insured took out a life insurance policy for the benefit of one to whom he was not related, payable to her, her executors, administrators, and assigns. The insured died after the beneficiary. Held, that the representatives of the beneficiary are entitled to receive the proceeds of the policy, but must hold them subject to a resulting trust in favor of the estate of the insured. *In re a policy in the Scottish Eq. Life Ass. Soc.*, 112 L. T. 197 (Eng., Ch. D.).

When property is purchased and title taken in the name of a stranger, it is the general rule that there is a presumption of a resulting trust for the donor. *Finch v. Finch*, 15 Ves. Jun. 43; see *Dyer v. Dyer*, 2 Cox 92. But this doctrine does not seem ever before to have been applied to life insurance policies, where the usual purpose is to make a gift to the beneficiary, and where therefore no presumption of a contrary intent is ordinarily well founded. It is general law that one who takes out a policy on his own life may make it payable to whom he pleases. *Ashley v. Ashley*, 3 Sim. 149; *Langdon v. Union, etc., Ins. Co.*, 14 Fed. Rep. 272. Moreover the payee collects the proceeds of the policy for himself, unless there be strong circumstances to show another intention. *Fairchild v. Northeastern, etc., Assoc.*, 51 Vt. 613; *Scott v. Dickson*, 108 Pa. St. 6; see *American, etc., Ins. Co. v. Robertshaw*, 26 Pa. St. 189. Even when the designated beneficiary dies before the insured, there is strong authority for the rule that his entire interest descends to his representatives. *Swan v. Snow*, 11 Allen (Mass.) 224; *contra*, *Ryan v. Rothweiler*, 50 Oh. St. 595. Moreover in the principal case the representatives of the beneficiary were designated, which furnishes an additional reason for allowing them to take, like the original beneficiary, for their own benefit. See *Glanz v. Gloekler*, 104 Ill. 573.

**INTERNATIONAL LAW — EXTRADITION — ACTS CONSTITUTING DIFFERENT CRIMES IN THE TWO COUNTRIES.** — The United States, on behalf of the State of Washington, asked for the extradition of a fugitive upon evidence which made out a case of larceny by embezzlement within the definition of the Washington statutes. In England, the same evidence showed neither larceny nor embezzlement, but it did show the crime of "fraud by a banker" within § 81 of the Larceny Act; which was an extraditable offence under the Extradition Act of 1870, and the Treaty of 1889 with the United States. The prisoner sued out a writ of *habeas corpus*. Held, that he must be remanded for extradition. *Rex v. Dix*, 18 T. L. R. 231 (K. B.).



In the absence of an extradition treaty or an empowering statute, it would seem that there is no right or power in the executive of this country or of England to arrest and return to another country fugitives from justice. See 14 HARV. L. REV. 607; CLARKE, EXTRADITION, 3d ed., 123. In fact, statutes are passed only to authorize or to apply treaties. It follows, then, that extradition can be had only in accordance with the provisions of the treaty. In construing such treaties, it is generally held that the facts on which the application for extradition is based, must show *prima facie* a crime by the law of the country to which the application is addressed; that the crime thus made out must be one of those named as extraditable in the treaty; and that the names of crimes in the treaty are to be interpreted according to the law of the country which is asked to grant the extradition. *In re Windsor*, 6 B. & S. 522. The facts which are necessary thus to make out an extraditable crime must also include sufficient facts to show a crime by the law of the demanding country. *In re Tully*, 20 Fed. Rep. 812. These things being shown, it is just and desirable, that extradition should be granted, though the crime made out in one country be not conterminous with that shown in the other, and though it be not known by the same name. *In re Bellencontre*, [1891] 2 Q. B. 122; *In re Arton* (2), [1896] 1 Q. B. 509.

INTERNATIONAL LAW — RENDITION — DESERTERS FROM SHIPS OF WAR. — X, a Russian sailor sent to Philadelphia by the Russian government to man the cruiser *Variag*, which was being built there, deserted while the vessel was still in the hands of the builders. Art. 9 of the Treaty of 1832 with Russia provides for the arrest, etc., of "deserters from ships of war and merchant vessels of" Russia. *Held*, that X is a deserter from a ship of war within the meaning of the treaty. *Tucker v. United States ex. rel Alexandroff*, 22 Sup. Ct. Rep. 195. See NOTES, p. 657.

MORTGAGES — CLOG ON EQUITY OF REDEMPTION — AGREEMENT OUTLASTING THE MORTGAGE. — A lessee of a public-house, in mortgaging his term, purported to bind the land by a covenant that no malt liquors except such as should be bought from the mortgagees should be sold there during the whole term of the lease. *Held*, that this covenant is invalid, as clogging the equity of redemption. *Noakes & Co. v. Rice*, [1902] A. C. 24.

A controlling stockholder in a company, in mortgaging his stock, contracted that he would use his best endeavors always thereafter to get the mortgagee employment from the company. *Held*, that this contract is enforceable, not being a clog on the equity of redemption. *Carritt v. Bradley*, [1901] 2 K. B. 550 (C. A.). See NOTES, p. 661.

MUNICIPAL CORPORATIONS — DE FACTO PUBLIC OFFICER — RECOVERY OF SALARY BY DE JURE OFFICER. — A city in good faith paid to a *de facto* tax collector the percentage usually allowed on collections. Later the plaintiff was declared the rightful holder of the office, and he performed the duties during the remainder of the term. He then joined the city and the *de facto* collector as defendants in a suit to recover fees for the entire term. *Held*, that he may recover from the city such portion as was not paid to the *de facto* collector, and that he may recover from the latter the sums paid to him by the city. *Coughlin v. McElroy*, 50 Atl. Rep. 1025 (Conn.).

Emoluments attaching to public offices are commonly treated as incidental to the right to hold the office, not to the actual discharge of duties. See *Nichols v. McLean*, 101 N. Y. 526. This results from the historical conception of a public office, not as a contract of employment but as analogous to a grant. See MECHEM, PUBLIC OFFICES, §§ 1-5. Accordingly, it is held that a *de facto* officer cannot enforce payment by the city for services rendered, while the rightful incumbent may recover from the city any balance remaining unpaid, and generally he may recover from the *de facto* officer all benefits received by him. *McCue v. County*, 56 Ia. 698; *Dolan v. Mayor, etc.*, 68 N. Y. 274; *Nichols v. McLean*, *supra*; but *cf. Stuhr v. Curran*, 44 N. J. Law 181. As to payments already made in good faith, the city is commonly, though perhaps illogically, protected. *Scott v. Crump*, 106 Mich. 288; *Dolan v. Mayor, etc.*, *supra*; but *contra, Andrews v. Portland*, 79 Me. 484. Abundant authority thus supports the principal case. It would seem, however, that the ultimate right to remuneration should depend more upon actual service. So, although the city should be compelled to pay no more than the full salary, yet as between the two claimants, the *de facto* officer, provided he has acted in good faith, should have a *quasi-contractual* claim against the *de jure* officer for the fair value of his services, and expenses necessarily incurred. This view is not wholly without authority. *Mayfield v. Moore*, 53 Ill. 428; and see *Stuhr v. Curran*, *supra*.

**PERSONS — HUSBAND AND WIFE — HUSBAND AS AGENT IN WIFE'S BUSINESS — RIGHTS OF HIS CREDITORS.** — A wife's success in business was due to the skill of her husband, who conducted the business as her agent. *Held*, that real estate purchased by him in her name with the profits of the business is subject to the husband's debts. *Blackburn v. Thompson*, 66 S. W. Rep. 5 (Ky.).

Even assuming that the business here was purchased and carried on with the wife's capital, which is by no means clear from the facts reported, the decision is supported by several well-considered cases, and the modern tendency seems in that direction. *Bogges v. Richards's Admr.*, 39 W. Va. 567; *Wilson v. Loomis*, 55 Ill. 352. The weight of authority and the general opinion of text-writers is still *contra*, however. *Mayers v. Kaiser*, 85 Wis. 382; 2 BISHOP, MARRIED WOMEN, §454; but *cf.* BUMP, FRAUD. CONVEY., 4th ed., §§224, 225. On principle it is difficult to say that a husband may not give away his labor to his wife as well as to another person, especially as he is the natural person to manage her property. But transactions like the present are generally mere screens to enable the husband in fact to conduct his own business more safely, or are carried out with the tacit understanding that he may use the profits to a reasonable extent for his own compensation. Therefore a hard and fast rule enabling his creditors to get at such part of the property as would represent a reasonable compensation for the husband would be equitable. See 8 HARV. L. REV. 430. If the claims of the creditors in the principal case fall within these limits, the case is to be supported.

**PROCEDURE — NEW TRIAL — JUROR UNABLE TO UNDERSTAND ENGLISH.** — It was discovered after verdict that a juror, who had not been challenged, was unable to understand the English language. *Held*, that this is not sufficient ground for granting a new trial. *San Antonio, etc., Ry. Co. v. Gray*, 66 S. W. Rep. 229 (Tex., Civ. App.).

It is very generally agreed that ignorance of the English language is a ground of challenge. *State v. Madigan*, 57 Minn. 425. One court, however, has held the contrary. *In re Allison*, 13 Col. 525. The proper time for challenging is before the jury is sworn; and if a party at that time knows or negligently fails to discover that any member of the panel is not qualified, and does not challenge, he is taken as waiving his right for all purposes. *Brunskill v. Giles*, 2 Moo. & Sc. 41; *St. Louis, etc., Ry. Co. v. Casner*, 72 Ill. 384. It would seem that this rule is based upon proper considerations of policy, to prevent fraud and unfair dealing by the parties. But when the cause of disqualification is not known until after the verdict, and the objecting party is chargeable with no negligence in failing to discover it, the reason for the rule is absent, and by the weight of authority the court may, in its discretion, grant a new trial. *Woodward v. Dean*, 113 Mass. 297. In some jurisdictions the new trial is allowed as a matter of right. *Shane v. Clarke*, 3 Har. & McH. (Md.) 101; *Quinn v. Halbert*, 52 Vt. 353. It would seem that when, as in the principal case, the unqualified member of the panel is practically a non-juror, a new trial ought unquestionably to be granted, for the verdict has in effect been found by less than twelve jurors.

**PROPERTY — COVENANT AGAINST INCUMBRANCES — LOCAL ASSESSMENTS.** — The defendant conveyed land to the plaintiff with a covenant against incumbrances. Prior to the sale a public improvement had been completed, and accepted by the city, and an assessment had been levied. After the sale the defendant paid the amount assessed upon the land sold. Later the assessment was adjudged illegal. Under its charter the city had no power to make a reassessment. An amendment was procured, remedying this defect, and a new assessment levied. This was paid by the plaintiff, who now sues on the covenant. *Held*, that he is entitled to recover. *Green v. Tidball*, 67 Pac. Rep. 84 (Wash.).

Where an unpaid assessment has been set aside the city's lien has been held not to be removed thereby. *Coburn v. Litchfield*, 132 Mass. 449. Similarly, where improvements have been made, but no assessment levied, so that no technical lien has attached, courts have held the land subject to an incumbrance. *Carr v. Dooley*, 119 Mass. 294; see also *Blossom v. Van Court*, 34 Mo. 390; but *cf.* *Harper v. Dowdney*, 113 N. Y. 644, *contra*. This view is based upon the right of the city ultimately to secure payment out of the land by taking proper proceedings to make a valid assessment; and considered strictly, it would seem inapplicable to the principal case where the city had, before amending its charter, no authority to make a reassessment. Considered more broadly, however, the just right of the city to contribution from this land would seem a substantial incumbrance, where, as here, the right is unenforceable because of a technical defect easily curable by legislation. Moreover technical difficulties may be avoided by allowing the reassessment to relate back to the date of the

first assessment. This view has been adopted in cases similar to the principal case. *White v. Stretch*, 22 N. J. Eq. 76; *Cadmus v. Fagan*, 47 N. J. Law 549; see also *Peters v. Myers*, 22 Wis. 602: but *cf. Langsdale v. Nicklaus*, 38 Ind. 289, *contra*.

**PROPERTY — GRATUITOUS PAROL PROMISE — IMPROVEMENTS — SPECIFIC ENFORCEMENT.** — The plaintiff, relying on the gratuitous parol promise of his father to give him certain land, moved thereto from a distance and made valuable improvements. The defendant had purchased from the father with notice of the promise to the plaintiff. *Held*, that equity will decree a conveyance by the defendant. *Scott v. Lewis*, 66 Pac. Rep. 299 (Or.). See NOTES, p. 659.

**PROPERTY — POWERS — APPOINTMENT TO TRUSTEE — LAPSE.** — Under a settlement, X had a general testamentary power to appoint a certain fund. By will she directed the trustees of the settlement to hold part of the fund for certain appointees and the residue for A. She then gave several legacies and bequeathed and appointed all the residue of her property to A. A died in the lifetime of X. *Held*, that X's next of kin are entitled to the residue of the settled property and it does not go as in default of appointment. *In re Martin*, 36 L. J. 670 (Eng., C. A.).

Where an executor is made trustee of property under a general testamentary power, and the beneficiary predeceases the testator, a trust will be raised for the testator's next of kin. *In re Van Hagen*, 16 Ch. D. 18. The reasoning of the courts would seem to place the case of a trustee who is not an executor on the same footing. See *In re Scott*, [1891] 1 Ch. 298; *In re Van Hagen*, *supra*. Whether this be correct or not, the present case is distinguishable. In the case of a direct appointment and the death of the appointee before the testator, it is as if there had been no appointment at all, and the property will go as in default of appointment. *In re Davies' Trusts*, L. R. 13 Eq. 163. The same conclusion seems proper in the principal case, where the trustees of the original settlement continued to hold the property and nothing was really appointed except the equitable interest. *In re Thurston*, 32 Ch. D. 508. Even in such a case, however, the testator may avert this result by showing a clear intent to blend the fund with the rest of the estate. *In re Pinède's Settlement*, 12 Ch. D. 667. But the language of the will in question hardly shows such intent.

**PROPERTY — RULE AGAINST PERPETUITIES — SEPARATION OF LIMITATIONS.** — Personal property was bequeathed to trustees in trust for A for life, and after her death, for such of her children as should attain the age of twenty-five years, but "in default of such issue" then over. A died without having had a child. *Held*, that the gift over is too remote. *Hancock v. Watson*, [1902] A. C. 14.

It seems to be settled that where a testator states two contingencies upon the happening of either of which an executory devise is to take effect, although one may be too remote, if the other is not too remote, the gift over is good in case the latter contingency happens. *Longhead v. Phelps*, 2 W. Bl. 703; *Jackson v. Phillips*, 14 Allen (Mass.) 539, 572. In the principal case, however, the two contingencies, namely, the death of A leaving no children, and the death of all her children before reaching twenty-five, are included in a single phrase; and in such cases, where the testator has not separated the contingencies, the court cannot do it, although one includes the other. *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358; GRAY, PERP., §§ 331-353; *cf. Sears v. Russell*, 8 Gray (Mass.) 86, 98. Nevertheless, if the limitation may upon an event included in that stated by the testator, take effect as a legal contingent remainder, the court may separate the contingencies, and hold the remainder good, if the event upon which it depends in fact happens. *Evers v. Challis*, 7 H. L. Cas. 530. The doctrine of *Evers v. Challis* being confined to legal remainders, the court rightly refused to apply it to the principal case, both because the interests are equitable, and because the subject matter is personalty, contingent interests in which are always executory. GRAY, PERP., § 339. A contrary interpretation of *Evers v. Challis* was adopted in one case, but later discredited. See *Watson v. Young*, 28 Ch. D. 436; *In re Bence*, [1891] 3 Ch. 242.

**QUASI-CONTRACTS — FORGERY BY AGENT — LIABILITY OF PRINCIPAL.** — One X was agent for the defendant to indorse and draw checks. In the defendant's absence X forged his principal's name to stock securities of the latter, and sold them to the plaintiff, who paid in checks to the order of the defendant, with whom he supposed himself to be dealing. The agent indorsed the checks into the bank, and subsequently drew out and embezzled the amount, and most of his principal's money. The princi-

pal, on discovering his losses, obtained new stock from the corporation. The plaintiff, having returned to the corporation the certificates in his hands, brought *assumpsit* for money had and received. *Held*, that the plaintiff is not entitled to recover. *Fay v. Slaughter*, 62 N. E. Rep. 592 (Ill., Sup. Ct.).

Lord Mansfield laid down the rule that in such an action the defendant is liable only for the money he has actually received, and may use as a defence anything which shows that the plaintiff is not equitably entitled to recover. See *Moses v. Macferlan*, 2 Burr. 1005, 1010. Clearly, apart from technicalities, the defendant in the principal case was not ultimately enriched, for though the money was deposited to his credit, he never had any opportunity to use it. *Cf.* KEENER, QUASI-CONTS., 333, 334. If the defendant has not been enriched he cannot be held, since the mere fact that he had wronged the plaintiff, if shown, would not support a quasi-contractual action. *National Trust Co. v. Gleason*, 77 N. Y. 400. It has, it is true, been held that where there are two wrongdoers each is liable for the total amount of the unjust enrichment of either or both. *City National Bank v. National Park Bank*, 32 Hun (N. Y.) 105. Under the reasoning of this case it seems that, if the defendant could on principles of agency be held liable for the tort, he might be charged for the enrichment of the agent. Such a decision, however, appears to be opposed to the equitable theory on which actions of this sort are based, and is inconsistent with *National Trust Co. v. Gleason*, *supra*. See KEENER, QUASI-CONTS., 200-202. The decision in the principal case, therefore, is to be supported.

STARE DECISIS — OVERRULED DECISION — CONSTRUCTION OF WILL. — The Supreme Court of Pennsylvania held that certain expressions in an instrument created a trust. Subsequently, another case arising as to the same document, this decision was overruled. *Held*, that a will executed and taking effect between the dates of these two decisions, should be construed according to the first. *Lisle's Estate*, 58 Leg. Intel. 490 (Pa., Orphans' Ct.). See NOTES, p. 667.

TORTS — NEGLIGENCE OF SELLER OF CHATTEL — LIABILITY TO THIRD PERSONS. — The plaintiff, a servant of a manufacturing jeweller, was injured by the breaking of a drop press, negligently constructed by the defendant and sold by him to the jeweller. *Held*, that no action will lie. *McCaffrey v. Mossberg, etc., Co.*, 50 Atl. Rep. 651 (R. I.). See NOTES, p. 666.

TORTS — SALE OF DANGEROUS ARTICLE — FAILURE TO WARN VENDEE. — Upon the plaintiff's order the defendant sent him a quantity of phosphorus properly packed and labelled, but without any specific warning as to its dangerous qualities. The letter ordering the phosphorus showed that the plaintiff was an illiterate person, and it did not indicate for what purpose the phosphorus was intended. By reason of the plaintiff's ignorance of the nature of the substance, an explosion occurred, and the plaintiff was severely injured. *Held*, that in an action for negligence a demurrer was properly sustained. *Gibson v. Torbert*, 88 N. W. Rep. 443 (Ia.).

Where the dangerous qualities of an article are not matter of common knowledge, there is a general duty upon those who send or deliver such article to others to give warning of the danger incurred by handling it. *Parrot v. Wells, Fargo & Co.*, 15 Wall. (U. S. Sup. Ct.) 524; *Farrant v. Barnes*, 11 C. B. N. S. 553. But where, as in the principal case, the substance is one whose dangerous character is generally known, a vendor would seem entitled ordinarily to assume such knowledge on the buyer's part. In such cases, though not under a general duty to warn, he may still be responsible where, as in the case of a child, he knows or has reason to know that through the buyer's ignorance or inexperience harm is likely to result. *Binford v. Johnston*, 82 Ind. 426. Selling to an adult known to be ignorant of the danger would come within the same rule. *Wellington v. Downer, etc., Co.*, 104 Mass. 64. So in the principal case it should have been left to the jury to say whether from the plaintiff's letter the defendant should reasonably have suspected that the plaintiff was ignorant of the nature of phosphorus. If so the defendant should be liable.

TRUSTS — CREATING A TRUST BY DYING INTESTATE. — A woman told her father that before taking an intended foreign trip she purposed making a will in her mother's favor. The father promised that her wishes as to the property would be followed. Within ten days she died suddenly intestate. *Held*, that these facts do not warrant a conclusion that a trust for the mother attached to the father's inherited share in the daughter's personalty. *Whitehouse v. Bolster*, 50 Atl. Rep. 240 (Me.).

According to some authorities, a trust for a third person may arise from a transfer absolute on its face, only if such transfer was induced by fraud prejudicial to an intended beneficiary; according to others, only if the transfer resulted from a reliance on the transferee's assent to hold for such beneficiary. *Moran v. Moran*, 104 Ia. 216; *Tee v. Ferris*, 2 K. & J. 357. Courts applying these tests are frequently forced to imply an original fraudulent purpose from the transferee's act of promising; or assent from notice to him of the transferor's terms. *Dowd v. Tucker*, 41 Conn. 197; *Mass v. Cooper*, 1 J. & H. 352. Moreover, in the distinction which they involve between trust expressions in an instrument of transfer and outside expressions, these tests oppose old authority. See SHEP., TOUCH., 518. It is conceived that in all cases where property is transferred to one person with the intention that a beneficial interest therein shall go to another, the creation of a trust obligation by such transfer depends not on anything done by the transferee, but rather on the acts of the transferor; accordingly the true explanation of the cases above would seem to lie in the broad principle that a transferee is bound by terms stated as part of the act of transfer or previously communicated to him in contemplation of that act. Cf. *Davis v. Coburn*, 128 Mass. 377. All these rules apply as well to transfers made by voluntarily allowing property to descend as to transfers by actual conveyance. *Sellack v. Harris*, 5 Vin. Abr. 521; *Williams v. Fitch*, 18 N. Y. 546. In the principal case, on any view, the essentials of a trust were lacking. The intestate affixed none to the transfer of her property for she intended no such transfer. In fact, the contingency of a trust was not in her mind at all. Nor can a constructive trust be raised out of the receipt of the property by the father gratuitously, contrary to the former owner's intention. The same principle applies, by which, in cases of mistake by a testator, a legal title intended for one person passes absolutely to another. See *Newburgh v. Newburgh*, 5 Madd. 364.

TRUSTS — ESTOPPEL AGAINST TRUSTEES — PAYMENT FROM TRUST FUND. — X agreed to render legal services without charge to the defendants, as trustees of a bankrupt's estate. Afterward, he assigned to the plaintiffs whatever claim he had against the defendants for legal services, and the trustees in writing promised the plaintiffs that they would pay them whatever sum the court should allow X, and stated that the fee ought to be a large one. A considerable allowance was made to the trustees for counsel fees; but no fee was allowed to X, though he made application. A balance of \$1850 remaining in the hands of the trustees, the plaintiffs put in a claim for it. *Held*, that the plaintiffs are entitled to the money. *Sione v. Hart*, 66 S. W. Rep. 191 (Ky.).

The language of the defendants practically amounted to a statement that the ordinary contractual relation of attorney and client existed between the defendants and X. The plaintiffs, therefore, might justly have a claim by estoppel against the defendants, the necessary change of position being found in the plaintiffs' omission to take immediate proceedings against X, who previous to this suit became insolvent. If liability is rightly incurred by trustees for the benefit of the estate, though suit is properly brought against the trustees individually, yet they are entitled to be reimbursed out of the trust property. But since, in the principal case, X had agreed to serve without fee, and the trustees acted entirely outside the line of their duty in making the contrary representation on which the plaintiffs' action is based, the trustees are not entitled to reimbursement. See LEWIN, TRUSTS, 9th ed., 725. The court therefore erred in allowing the plaintiffs' claim to be paid out of the trust fund. See *In re Johnson*, 15 Ch. D. 548. The decision seems to rest on the assumption that if the plaintiffs did not get the money it would go to enrich the trustees. On the contrary, it is submitted that whatever part of the gross sum allowed for counsel fees was not expended for that purpose, would be held on a constructive trust for the creditors of the estate.



## BOOKS AND PERIODICALS.

**THE SITUS OF DEBTS.**—The doctrine advanced by Mr. Minor in his **CONFLICT OF LAWS**, that when a debtor and a creditor are domiciled in different states, the debt is taxable not only at the domicile of the creditor but at that of the debtor as well, has met the approval of a recent writer. *The Situs of Debts for Purpose of Taxation*, by E. S. Maloney, 7 Va. L. Reg. 606 (Jan., 1902). If such a tax is to be justified at all it must be as a tax on property. It does not profess to be a tax upon the debtor because whatever the debtor pays is to be deducted from the amount due. On the other hand, this cannot be taxation of the creditor, inasmuch as he is not within the jurisdiction of the taxing power. An inquiry thus arises as to what property situated within the state of the debtor's domicile may be thus subjected to taxation. Admittedly the debtor has no property in the debt. **MINOR, CONFL. LAWS**, § 123. But it is contended that the obligation to pay is property belonging to the creditor and the tax is thus defined as upon property of the creditor in the hands of the debtor.

To say that a debt has a situs either at the domicile of the creditor or at that of the debtor is obviously to state a fiction. A *chose in action* is in its nature incapable of location at any particular place. Field, J., in *State Tax on Foreign Held Bonds*, 15 Wall. 300. The fact that a creditor comes into a particular state does not give that state any real power or control over property which it did not have before. An illustration of this truth is found in the freedom of *choses in action* from execution at common law and in the fact that even under modern statutes the proceeding is purely equitable in its nature because jurisdiction over the person of the debtor is necessary to execution upon the debt. Again, if the tangible property from which the *chose in action* derives its value is situated without the jurisdiction, there is nothing which the state can seize and out of which taxes can be taken. Nor can it prevent any dealing whatsoever with that property by the state within which it is located, even though the *chose in action* be thereby rendered utterly worthless. The logical view seems to be that the right to tax in these cases arises not out of jurisdiction over property, but by reason of control over the person, and that the tax is not in reality a tax on property, but upon the person measured by property in the debt.

The conception of the obligation of the debtor as property in his own hands belonging to the creditor does not, in this view, aid Mr. Maloney's contention, inasmuch as the obligation exists no more in one place than in another. Moreover, it is not the duty of the debtor to pay, but rather the corresponding right to enforce that duty that may properly be defined as the creditor's property and this right cannot in any sense be said to be property in the hands of the debtor. It is contended, however, by Mr. Maloney that this right to sue is property situated within the state of the debtor's domicile because enforceable there. But the claim against the debtor being personal, he may be sued wherever found. All states hold themselves ready to enforce the obligation, and if this is the property taxed, it is taxable in all jurisdictions alike.

Accepting the well established principle that the power of taxation is limited to persons or things within the sovereignty, it is submitted that the right contended for does not exist. There is nothing at the domicile of the debtor to be taxed. The tax is not levied upon the debtor, the creditor is without the jurisdiction, and no property can be located within it. Whether courts have the power to declare such taxation invalid is another matter, but by the great weight of authority it has been so held as falling within the clause of the federal constitution which forbids impairing the obligation of contracts. **COOLEY, TAXATION**, 2d ed., 22; *State Tax on Foreign Held Bonds*, *supra*; *Murray v. Charleston*, 96 U. S. 432. The cases cited in support of Mr. Maloney's view will be found upon examination to deal with taxation upon business or earnings

and not upon obligations. *Michigan Cent. R. Co. v. Collector*, 100 U. S. 595; *U. S. v. Erie R. Co.*, 106 U. S. 327. As to the dictum in *Bridges v. Griffin*, 33 Ga. 113, see *Collins v. Miller*, 43 Ga. 336.

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**SELECT PLEAS, STARRS, AND OTHER RECORDS FROM THE ROLLS OF THE EXCHEQUER OF THE JEWS, A. D. 1220-1284.** Edited for the Selden Society by J. M. Rigg. London: Bernard Quaritch. 1901. pp. lxi, 152. 4to.

This work is produced under the coöperation of the Selden Society and the Anglo-Jewish Historical Society—an economical arrangement which might well be repeated by these societies and imitated by others. The archives of the Exchequer of the Jews at the Public Record Office comprise two general classes: fiscal documents (account rolls, etc.) and plea rolls. The selections edited by Mr. Rigg, which are taken exclusively from the latter, throw light on the relations of the Jews to the king, the nobility, and the clergy, on the fiscal and judicial machinery of the Jewish Exchequer, and the law or custom of the Jewry. The Jews were regarded as royal property, and, like the forests, were under the jurisdiction of special royal justices. "The Exchequer of the Jews, though it had its own seal and separate staff of officers, was not so much a separate Court as a branch of the Great Exchequer, invested with a jurisdiction never very precisely defined, and which never became, though it tended gradually to become, exclusive of that of the King's Court. Its procedure did not differ materially from that of the Great Exchequer, except so far as it was modified by the Assisa Judaismi, of which the most important feature was the right of a Jew to trial by a panel *de medietate* when impleaded by a Christian upon a cause of action arising within the Jewry."

Mr. Rigg's volume is a valuable addition to the publications of the Selden Society. His Introduction gives a good account of the history of the Jews of England during the twelfth and thirteenth centuries, and his editorial work is scholarly. It is difficult, however, to ascertain what he has added to the sum of our knowledge; as he rarely refers in his footnotes to the investigations of other writers on this subject, many readers will carry away the erroneous impression that most of his conclusions are novel. On pp. xl-xli he prints a document which he says was first edited in 1896, but in fact it was published in 1888 in the Anglo-Jewish Exhibition Papers (Exchequer of the Jews, Appendix); the appendix of that essay also contains the articles touching the Jewry, printed by Mr. Rigg on pp. lv-lxi.

C. G.

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**A TREATISE ON THE LAW OF ATTACHMENTS, GARNISHMENTS, JUDGMENTS, AND EXECUTIONS.** By John R. Rood. Ann Arbor: George Wahr. 1901. pp. 183, 549. 8vo.

The law of remedies is the author's general subject in two previous books; one, a somewhat compendious text-book on garnishment solely for the practitioner, the other, a series of selected cases solely for the student. This latest, most comprehensive work is one fourth text, and the rest, a collection of cases, annotated, and an index. Much of the raw material used for the first two books must necessarily have entered as well into the present production, which, indeed, will probably supplant the earlier class-room manual. A more original mode of treatment has been adopted. The former plan was apparently to state the law in an available form; the declared purpose of the present work is to go further, to correlate propositions formerly treated as independent, to treat them all as far as possible as parts of a rational, consistent whole, and to discuss the relation of this subject, so unified, to other parts of the law that it touches. The

form which the author gives the book is fitted to this scheme. The footnotes contain, instead of exhaustive lists of citations, merely references to recognized secondary authorities or to the leading cases reprinted in the volume itself; to the end that attention is not diverted from the argument.

The author's analytical process has the gratifying result of ridding his subject of many inaccuracies. He trenchantly disposes of this or that current, over-general statement, and substitutes freely his own opinions. Under these circumstances it is not surprising that he prunes at times too close. In § 22, for example, he distinguishes between objections to a judgment which are taken in the case in which the judgment is rendered and objections taken collaterally, showing that in the former case a judgment may not stand if it is improper, whereas in the latter it stands against any objection but that of validity, that is, the objection that the court that rendered it had no jurisdiction. He concludes that it is only in the cases of collateral attack that questions of jurisdiction are really decided and that all judicial expressions elsewhere must be *dicta*. His conclusion seems illogical. Suppose, for example, that a defendant appears specially to object to the jurisdiction of the court, or appeals on jurisdictional grounds alone. The only criterion of the propriety of the judgment in question is almost by hypothesis its validity. At some stage in the reasoning the question of validity must be decided; it is therefore necessarily involved.

In some respects the author does not come up to his self-imposed standard. He frequently neglects opportunities to examine and compare. His further treatment of the subject of jurisdiction may be taken by way of illustration. It is *prima facie* an axiom that a court, when it has no jurisdiction, can do no valid act. Various statements, however, are made in the text which in theory at least seem opposed to this view and the inconsistency is overlooked. For example, the statement is approved in § 26 that "If any jurisdictional question is *debatable* or *colorable*, the tribunal must decide it; and an erroneous conclusion can only be corrected by some proceeding provided by law for so doing, commonly called a direct attack." The principle is not explained by which a court, wherever the question of its jurisdiction is debatable can validate its acts simply by deciding that it has jurisdiction. There seems also in this an inconsistency, in language at least, with the rule laid down in § 58, that "In actions on foreign judgments the defendant may show that the judgment is void because some jurisdictional fact alleged in the record did not exist." See *Van Fossen v. The State*, 37 Oh. St. 317. This last passage, moreover, is hard to reconcile satisfactorily with those immediately following, to the effect that statements in the record of a domestic judgment may not be disproved by way of collateral attack even by a stranger to that record. Here, again, acts done by a court without jurisdiction are apparently treated as valid. Considered in this light, cases of this sort would seem to be offered the principle of the rule in § 13, that the correctness of an entry of judgment on the record may be disproved collaterally by showing that no judgment was in fact pronounced. Again, in § 152, the statement that an officer is absolutely protected, even against a stranger, in obeying a writ, fair on its face, commanding him to seize a certain specified thing, seems an unexplained exception to the rule to which such officers are in general subject, that the command of the court excuses only against parties within the court's jurisdiction to bind by the particular command. In short, the author has in these places done no more than made the need for classification more apparent.

Of coördinate importance with the text is the collection of cases, chosen with discretion and edited with clearness.

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BRITTON, AN ENGLISH TRANSLATION AND NOTES. By Francis Morgan Nichols, with an introduction by Simeon E. Baldwin. Washington, D. C.: John Byrne & Co. 1901. pp. xxvii, 649. 8vo.

The original, of which this is apparently an excellent translation, is a Norman-French manual of the time of Edward I., founded mostly on Bracton's great



work of the preceding reign. It is in the form of commands put in the mouth of the King, and was perhaps compiled by his direction. The utterly inconclusive evidence as to the identity of the author is discussed in the introduction. However, it seems clear that the book was written after the Statutes *De Donis* (1285) and *Quia Emptores* (1290), but, as the editor remarks, before the effect of these statutes was known. Throughout the work the substantive law is expounded solely by describing the remedies — the natural method until a somewhat advanced stage of legal development is reached. The relative importance of various branches of the law at the end of the thirteenth century is roughly indicated by the fact that all the writer has to say directly about the organization of the courts, the duties of royal officers, and the law of crimes, appeals, torts, contracts, and persons is thrown into the first book. The next five consider the possessory actions concerning land, and the sixth deals with the writ of right. The work as we have it is obviously incomplete. From the general scheme we may, perhaps, judge that the sixth book was the last, but, owing to the unscientific arrangement, it seems impossible to guess how much of it is lost. The whole work will be interesting to all who have a slight acquaintance with legal history and value it either for its own sake or for the important light it throws on modern law. The translator has added many helpful notes and there is a good index. The introduction gives a short synopsis of the work and an estimate of Britton's position in the history of the law.

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**A STUDY OF THE UNITED STATES STEEL CORPORATION IN ITS INDUSTRIAL AND LEGAL ASPECTS.** By Horace L. Wilgus, Professor of Law in the University of Michigan. Chicago: Callaghan and Company. 1901. pp. xiii, 222. 8vo.

This book is made up of lectures delivered by Professor Wilgus to his class in Corporations, and makes very interesting reading at this time when the United States Steel Corporation is so prominently before the public. The author has collected many facts concerning the organization and the industrial position of this corporation, and although the telling necessarily involves many figures, yet it is done so simply and briefly that the reader's interest is sustained throughout. For those who desire more elaborate and technical details, there is a full collection of appendices. Throughout the account one is more and more impressed by the magnitude and extent of the enterprise, by its far-reaching influence and effect, and by the responsibility and power of those who direct its management.

To the sixty-five pages that are devoted to the story of the company, Professor Wilgus adds, in some forty pages, his views on the legality of corporate combinations. The treatment of this subject seems superficial and unsatisfactory and the results seem based on insufficient reasoning. The lack of careful analytical treatment leads the author to pass over easily the difference between the trust, which has often been declared illegal and which has so largely been discarded, and the modern corporation forming its combinations under state authority. So shortly does he dismiss this distinction that he fails to notice many important considerations that make the difference in form very important, although the objects may be the same. As examples of the extremely important results of the corporation form, the greater publicity of its affairs and of its condition and the more direct state control suggest themselves. Certainly the fact that this corporation has been held to be legal by the highest courts of the state under whose laws it was formed would alone seem to call for a more thorough treatment. See *Trenton, etc., Co. v. Oliphant*, 58 N. J. Eq. 507. On pages 76-81, the author points out the similarity of the United States Steel Corporation to the Standard Oil Trust by means of prolix parallel columns. This method is far from satisfactory, however, as by cleverness in wording and an enumeration of unimportant details, the important actual distinctions are skillfully passed over or hidden. Certainly it would be much more convincing to point out and deal directly and thoroughly with important essential features.

Again such extreme statements, as the one on pages 85-86, that a state cannot in any way confer upon any corporation any power to do what the laws of that state forbid, are so sweeping as to be misleading.

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**COMMERCIAL TRUSTS: THE GROWTH AND RIGHTS OF AGGREGATED CAPITAL.**  
By John R. Dos Passos. New York and London: G. P. Putnam's Sons.  
1901. pp. viii, 137. 12mo.

This book, which is one of the "Questions of the Day" Series, gives us the argument delivered by Mr. Dos Passos, of the New York bar, before the Industrial Commission at Washington. The author's purpose at that time was primarily to protest against any hasty and ill considered legislation, and to urge in particular that there be no legislation to hamper the natural development of the laws of trade, or at least that any such legislation be postponed until the real dangers of industrial combinations are more apparent. He argues that these enormous business combinations are produced by inevitable economic tendencies, and that natural economic laws can so well deal with them that the alleged dangers are more imaginary than real. In concluding he urges that the effect of demagogism upon the development of trade is much more dangerous practically than is the corporate combination.

The only regret that the reader feels in laying aside the book is that the author did not devote himself to a longer, more thorough, and more detailed treatment. Whether one agrees with Mr. Dos Passos in his conclusions or not, he cannot but appreciate the value of so careful, moderate, and analytical a discussion. Several of the distinctions which the author draws are extremely valuable, as for example between the "trust," so often held illegal, and the modern corporate combination. Again, the difference in kind between a monopoly depending upon a state franchise and a monopoly that results from possessing the sources of supply of an article of commerce and the corresponding difference in the treatment demanded are well pointed out.

Amid so much discussion that is political and extravagant, the book is a grateful relief and will doubtless produce substantial results.

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**CROMWELL ON FOREIGN AFFAIRS, together with Four Essays on International Matters.** By F. W. Payn. London: C. J. Clay & Sons. 1901. pp. vii, 167. 8vo.

In the four essays on international matters, the author discusses Neutral Trade in Arms and Ships, Intervention among States, The Burning of Boer Farms and The Bombardment of Coast Towns, and The Extent of Territorial Waters. On all four topics the author dissents from the views expressed by the late Mr. W. E. Hall, whose book on International Law is the modern English authority. In the course of his essays Mr. Payn curiously enough shifts his point of view. In his first essay, he asks for a total prohibition of trade in arms and ships by the citizens or subjects of a neutral, on the ground that such trade is a violation of moral duty, on which he says international law is based. On the other hand, in discussing the burning of Boer farms, forgetful of this supposed moral basis of international law, he condemns "the insane leniency of the military staff" in sparing any farms on the field of war, and advocates a systematic destruction of private property regardless of the use to which it is put. Continuing, he states his conviction that the bombardment of coast towns is a perfectly lawful incident of war, and that the right to bombard should be exercised.

There is much that is excellent in the essays, and some of the author's suggestions give food for thought; but the book is unfortunately marred by the cavalier and almost contemptuous treatment accorded by the author to views opposed to his own. Undoubtedly there is possibility for modification and improvement in some of the views he combats, but it is suggested that the

weakness of those views could be made apparent more surely by adducing evidence against them than by merely denying their tenableness.

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**CASES ON THE LAW OF DAMAGES.** Selected by Floyd R. Mechem. Third Edition. St. Paul: West Publishing Co. 1902. pp. xvi, 758. 4to.

This selection, comprising some two hundred and fifty cases, illustrates the application of the leading general principles of the law of Damages. The book is intended primarily for use in connection with the instruction of students. With this purpose in view, it would seem that the author might have made a more judicious selection of shorter cases to illustrate many points. So, too, the usefulness of the book in the hands of students would have been greatly enhanced had portions of the opinions not dealing with the subject of Damages been omitted. An ideal case-book for use in a law school requires more effort on the part of the author and less by the publisher. The absence of an index and head-notes to the cases renders the work of doubtful value to the practitioner.

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**A MANUAL OF THE PRINCIPLES OF EQUITY.** By John Indemaur. Fifth Edition. London: Geo. Barber. 1902. pp. xxxii, 574. 8vo.

**ESSAYS IN LEGAL ETHICS.** By George W. Warvelle. Chicago: Callaghan & Co. 1902. pp. xiii, 234. 12mo.

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## MODES OF TRIAL IN THE MEDIÆVAL BOROUGHES OF ENGLAND.

THE boroughs of mediæval England doubtless generated some new ideas of government and were a progressive element of society; but historians are inclined to ignore the fact that for a long time after the Norman Conquest the burgesses exhibited a strong conservative spirit in the maintenance of Anglo-Saxon legal usages. Traces of these old usages are visible in the town charters and customals of the twelfth and thirteenth centuries, a careful study of which would probably supplement our meagre knowledge of Anglo-Saxon law. Among the instructive vestiges of a remote past imbedded in town muniments those concerning legal procedure are particularly interesting. The adherence of the burgesses to the older modes of trial is a subject which has never been adequately investigated,<sup>1</sup> and concerning which it is difficult to formulate general conclusions owing to the divergence of local usage and the meagreness of printed records.

To understand the peculiarities of procedure in the boroughs we must at the outset recall to mind the general history of procedure in the royal courts. In the Anglo-Saxon period justice was administered mainly in the local popular tribunals of the shire, hundred, and borough, and the most common forms of trial were compurgation and the ordeal of fire or water. After the Norman Conquest the king's court became the centre of gravity of the judicial sys-

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<sup>1</sup> One of the best accounts will be found in Thayer's *Treatise on Evidence*, 24-46.

tem, and in suits tried by that tribunal the duel competed with compurgation and the old ordeals as a favorite test of justice. Henry II.'s Assize of Clarendon (1166) enacted that all indicted criminals should go to the ordeal of water; but about the year 1219 the fire and water tests were abolished and were soon replaced by the jury. In civil cases, also, this latter mode of trial rapidly gained ground since Henry II.'s reign, so that by the middle of the thirteenth century it was applied by the royal judges to most civil and criminal suits. But throughout the Middle Ages the duel and compurgation continued in use in the royal courts to a limited extent; the former to determine petitory actions and less frequently for the trial of persons appealed of felony; while compurgation was resorted to in some civil actions, especially to deny a debt or to prove that a party had not been summoned to appear in court.<sup>1</sup> In such cases the denial would be supported with "the twelfth hand," *i. e.*, with eleven oath-helpers, whom the chief swearer would be allowed to choose.<sup>2</sup>

I. *The Ordeal*. — We are now prepared to trace the history of the various forms of trial in the boroughs. As regards the ordeals of fire and water, which received a deathblow throughout Western Europe by the enactment of the Lateran Council of 1215, little need be said, and little can be ascertained from an examination of the sources. They were used by litigants in Anglo-Saxon towns;<sup>3</sup> they are referred to in an early, undated customal of Preston;<sup>4</sup> and, according to charters granted by Roger de Lacy to Pontefract in 1194, and by Maurice Paynell to Leeds in 1208, a person accused of larceny for the second time was to disprove the charge by the water ordeal or by combat.<sup>5</sup> On the other hand, a contemporary biographer of Thomas Becket informs us that in criminal

<sup>1</sup> Wm. Salt Soc. Collections, vi. pt. i. 71, 130, 134, 137, 204, xi. 58; new series, iii. 174, 175, iv. 99.

<sup>2</sup> On the older modes of trial (including trial by witnesses) in the royal courts, see Thayer, *Treatise on Evidence*, 1-46; Pollock and Maitland, *English Law*, bk. ii. ch. ix. § 4. Compurgation also survived in the ecclesiastical and seignorial tribunals: Pollock and Maitland, 1st ed., i. 426, 427, ii. 632.

<sup>3</sup> Athelstan, vi. c. 9; Ethelred, iv. cc. 3, 7: Schmid, *Gesetze*, 169, 219, 221.

<sup>4</sup> *English Hist. Review*, xv. 497. The customal is of the twelfth or thirteenth century.

<sup>5</sup> *Hist. MSS. Com.*, viii. 270; Boothroyd, *Pontefract*, app. ii.; Wardell, *Leeds*, app. vi. Roger de Lacy asserts that the laws which he grants to Pontefract are those of Grimsby. During the twelfth and thirteenth centuries the fire and water ordeals were also used in some continental towns to rebut accusations: Lea, *Superstition and Force*, 4th ed., 202; Keutgen, *Urkunden*, 204, 207, 552.

accusations the ordeal of fire or water could not be imposed upon citizens of London, Oxford, and other towns against their will.<sup>1</sup> This evidence, coupled with our information regarding the prevalence of compurgation, indicates pretty clearly that the fire and water tests were not prominent, at least in criminal cases, during the second half of the twelfth century.

II. *The Duel*. — Judicial combat was regarded with aversion by the burgesses, whose vocations naturally made them inclined to adopt more peaceful modes of litigation. A London record, seemingly of the thirteenth century, condemns it as an instrument of justice, on the ground that "the strong might put to shame the weak, the young the old, for the old and the weak would not be able to make proof by battle against the strong and the young."<sup>2</sup> A well-known law of William the Conqueror enabled the conquered Anglo-Saxons to avoid it in criminal suits;<sup>3</sup> and exemption from the duel (*quod nullus burgensis faciat duellum*) is one of the most common privileges mentioned in the town charters of the twelfth and thirteenth centuries.<sup>4</sup> The franchise thus granted is often limited to appeals of felony — criminal accusations brought by one person against another,<sup>5</sup> for these were crown pleas reserved for the cognizance of the royal justices. Even when appeals are not expressly mentioned, many charters add to the exemption from battle the stipulation that "in crown pleas" the burgesses may clear themselves by a compurgatorial oath, or according to the ancient custom of the town, or according to the custom of some other town.<sup>6</sup> In fact the burgesses desired above all to secure protection from the duel in criminal charges jeopar-

<sup>1</sup> "Non examine aquæ vel ferri candentis se purgabant nisi sponte elegerint:" *Materials for the History of Becket*, iv. 148. The references in the Pipe Rolls to the water ordeal (*judicium aquæ* or *juisium*) in London and Windsor probably relate to the execution of the Assize of Clarendon and throw no light on our subject: 12 Henry II., 132; 13 Henry II., 1; 14 Henry II., 198; 16 Henry II., 16.

<sup>2</sup> *Liber Albus*, 109.

<sup>3</sup> Stubbs, *Select Charters*, 84.

<sup>4</sup> *Ibid.* 108, 112, 266, 267; *Rotuli Chartarum*, ed. Hardy, 5, 20, 45, 56, 78, 83, 91, 135, 138, 175, 211, 217, 219; *Madox, Firma Burgi*, 28; *Chartæ Hiberniæ*, 6, 13, 20, 22, 24, 33, 36, 37, 39; *Liber Albus*, 128-164; *Hist. MSS. Com.*, ix. pt. i. 166.

<sup>5</sup> *Chartæ Hiberniæ*, 6, 12, 13, 20, 22, 24, 26, 36; *Rotuli Chartarum*, 78; Stubbs, *Select Charters*, 112; *Boldon Buke*, ed. Greenwell, app. xli. *Cf.* *Liber Albus*, 109; *Select Pleas of Crown* (Selden Soc.), 39.

<sup>6</sup> *Rotuli Chartarum*, 20, 56, 83, 217, etc. The charter of Dunwich, 1215, seems to be the only one that specifies exemption from the duel in suits concerning land: "duellum non faciat . . . neque de terra neque de latrocinio neque de feloniam neque de alia re, nisi tantum de morte hominis exterioris" (*Ibid.* 211).

dizing life or limb, which were tried in the eyre or *curia regis*; in their own municipal courts they were sufficiently protected by "ancient custom," which seems to have excluded judicial combat from both civil and criminal pleas.<sup>1</sup>

Writers who have heretofore examined this subject have, however, failed to observe that in certain cases the duel might be waged even in some of the most privileged boroughs.<sup>2</sup> This could be done in London in the twelfth and thirteenth centuries if both parties consented and waived the franchise of the city.<sup>3</sup> At Leicester, according to the finding of a jury in 1253, the duel was allowed, at least in pleas of land, until the time of Henry I.<sup>4</sup> At Newcastle-upon-Tyne in the reign of Henry I an appeal of treason had to be disproved by combat; and the same rule seems to be referred to in a grant of Richard I. to the citizens of York authorizing them to clear themselves by compurgation in all appeals of felony, except when they are appealed "of the body of the king."<sup>5</sup> A charter of Hugh Pudsey (*temp.* Hen. II.) states that a burgess of Wearmouth who is accused by a villain may defend himself by compurgation, except when accused of such felony as demands proof by combat.<sup>6</sup> According to charters of Bristol, 1188, and Dunwich, 1215, wager of battle was permitted when a burgess was appealed for the death of a stranger.<sup>7</sup> The charters of Pontefract and Leeds, already referred to in connection with the old ordeals, grant that a burgess may purge himself of a second accusation of larceny by combat; and in the thirteenth century the burgesses of Kilkenny, Carlow, and Rosbercon are exempted from the duel except for the death of a man, larceny, and other pleas *unde duellum rationabiliter fieri debeat*.<sup>8</sup> In the fourteenth century it was the custom at Fordwich to require a stranger (*extraneus probator*) who appealed a burgess of felony to prove his charge by fighting with the accused in the

<sup>1</sup> See the thirteenth century customals of Ipswich, Hereford, and Winchester: Domesday of Ipswich, 32, 36; Johnson, Customs of Hereford, 38; Archæological Journal, ix. 75. Cf. Fleta, bk. ii. c. 55; Lyon, Dover, ii. 273; English Gilds, ed. T. Smith, 361; Statutes of the Realm, 1810, i. 218.

<sup>2</sup> This statement also applies to Scotch and continental towns: Lea, Superstition and Force, 200-206; Keutgen, Urkunden, 575; Innes, Ancient Laws, 7, 8, 11, 163.

<sup>3</sup> Materials for the History of Becket, iv. 148; Liber Albus, 109.

<sup>4</sup> Records of Leicester, ed. Bateson, i. 40-42.

<sup>5</sup> Stubbs, Select Charters, 112; Drake, Eboracum, 204 (confirmed, 36 Henry III., *ibid.*).

<sup>6</sup> "Nisi de tali scelere appellatur pro quo recte se debeat per duellum defendere:" Boldon Buke, app. xli.

<sup>7</sup> Seyer, Charters of Bristol, 6 (confirmed, 1252, *ibid.* 17); Rotuli Chartarum, 211.

<sup>8</sup> Chartæ Hiberniæ, 33, 37, 39.

water of the river Stour.<sup>1</sup> But the wording of most of these documents indicates that we are here dealing with exceptions to a municipal privilege or general rule of burghal law which excluded judicial combat from legal procedure; and if we may judge from the few court records of boroughs which have been printed, we may conclude that in practice this rule was rarely broken.

III. *Compurgation*. — We come now to a form of purgation which was doubtless in common use in the boroughs before the Norman Conquest,<sup>2</sup> and was the dominant feature of burghal procedure in the twelfth and thirteenth centuries. This is evidently the mode of trial referred to in the clause of the early town charters which grants that crown pleas are to be determined according to the ancient custom of the borough.<sup>3</sup> Historians of legal institutions who have investigated this part of our subject have drawn their material from a limited range of sources, and have not sufficiently emphasized the wide prevalence of the compurgatorial process in the criminal actions of burgesses before and long after its disappearance as a normal form of purgation in the criminal procedure of the royal courts.

Various documents of the twelfth century refer to its use in appeals of felony or crown pleas, which, as we have already pointed out, were usually tried before the royal justices, and hence were liable to be decided by the duel, unless the chartered rights of the townsmen authorized them to purge themselves by the oaths of their neighbors. According to the customs of Newcastle-upon-Tyne, compiled in the reign of Henry I., a burgess appealed by a burgess is to defend himself not by duel but by compurgation (*per legem*);<sup>4</sup> and Henry I.'s charter to the citizens of London permits rebuttal by oath in crown pleas.<sup>5</sup> A biographer of Becket, writing between the years 1170 and 1177, says that in crown pleas the citizens of London shall respond in

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<sup>1</sup> Hist. MSS. Com., v. 442; Woodruff, Fordwich, 229. See also various references to the duel in the customal of Preston (twelfth or thirteenth century): English Hist. Review, xv. 497-9, 512.

<sup>2</sup> Ethelred, iv. cc. 3, 7: Schmid, Gesetze, 219, 221.

<sup>3</sup> Above, p. 693. Cf. Liber Albus, 89-92.

<sup>4</sup> Stubbs, Select Charters, 112.

<sup>5</sup> Ibid. 108. This privilege was confirmed by every king of England from Henry II. to Henry IV.: Liber Albus, 129-65; Liber Custumarum, 248-64. Charters of John, Edward III., and Richard II. grant that for any crime the punishment of which should endanger life or limb the citizens are to be judged *per legem civitatis*: Liber Albus, 148, 153; Liber Custumarum, 250.

their city, and shall be judged by their laws : they shall not purge themselves by combat or the ordeal, unless they shall voluntarily elect to do so, but every case is to be settled by oath (*ibi finis est omnis controversiæ sacramentum*).<sup>1</sup> Joceline de Brakelond informs us that in accusations of theft it was customary for the burgesses of Bury St. Edmunds to be acquitted by the oaths of their neighbors ;<sup>2</sup> and, according to a charter granted by Hugh Pudsey, a burgess of Wearmouth who is appealed by a villain is to clear himself "by the civic law (*legem civilem*), namely, by thirty-six men."<sup>3</sup> In 1194 Roger de Lacy allows the burgesses of Pontefract to refute any charge of bloodshed with five compurgators (*jurabit se sexto*) and to refute other charges with two compurgators, but a burgess accused of larceny is to "make his law with the thirty-sixth hand," i. e., with thirty-five compurgators.<sup>4</sup> Richard I. granted the townsmen of Colchester the right to clear themselves by oath in crown pleas, and the same king permitted the citizens of York to defend themselves in appeals by the oaths of thirty-six men of the city.<sup>5</sup> In 1192 Dublin received a similar privilege from Richard's brother John, but this charter requires the coöperation of forty oath-helpers.<sup>6</sup> In 1190 the citizens of Winchester were authorized to make their rebuttal in crown pleas "according to the ancient custom of the city," which is explained by a grant of William the Lion (1165-1214) to the boroughs of his kingdom to mean "by the acquittance of twelve leal burgesses."<sup>7</sup> Moreover, Richard I. authorized the burgesses of Lincoln, Norwich, and Northampton to deraign themselves (*se disrationare*) in crown pleas according to the custom of the city of London.<sup>8</sup> In the year 1200 the citizens of Lincoln claimed that they ought not to wage battle for any appeal, but that they

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<sup>1</sup> Materials for the History of Becket, iv. 148.

<sup>2</sup> Memorials of St. Edmund's Abbey, ed. T. Arnold, i. 301. Joceline's reference may be ascribed to the last quarter of the twelfth century.

<sup>3</sup> Boldon Buke, app. xli. Pudsey died in 1195.

<sup>4</sup> Hist. MSS. Com., viii. 270. The same rules are laid down in the charter of Leeds, 1208: Wardell, Leeds, app. v., vi. Roger de Lacy asserts that the laws which he grants to Pontefract are those of Grimsby.

<sup>5</sup> Madox, Firma Burgi, 28; Drake, Eboracum, 204.

<sup>6</sup> Chartæ Hiberniæ, 6, 12.

<sup>7</sup> Stubbs, Select Charters, 266; Innes, Ancient Laws, 163; cf. *ibid.* 11, for this form of oath in the first half of the twelfth century. King John granted the burgesses of Marlborough and Newcastle-upon-Tyne the right to be tried according to the law or ancient custom of Winchester: Rotuli Chartarum, 135, 219.

<sup>8</sup> Stubbs, Select Charters, 267; Fœdera, 1816, i. 63; Hartshorne, Northampton, 24. For confirmations by King John, see Rotuli Chartarum, 5, 20, 45.



should be tried according to the laws and liberties of London; and in an appeal of robbery before the royal justices in the same year a citizen of Lincoln waged his law with the thirty-seventh hand.<sup>1</sup>

The evidence showing that burgesses could substitute compurgation for the duel in criminal cases tried before the royal justices is even more abundant in the thirteenth century. During the reign of John the citizens of Waterford were granted the right to purge themselves in appeals of felony by the oaths of twelve, the townsmen of Dunwich by the oaths of twenty-four, and the men of Egremont (in accusations of robbery) by the oaths of thirty-six.<sup>2</sup> Charters of Henry III. prescribe twenty-four compurgators for appeals in Cork and Drogheda, and thirty-six in Scarborough;<sup>3</sup> charters of Edward I. prescribe twenty-four in Berwick and forty in Limerick.<sup>4</sup> In pleas before the royal justices in 1202 and 1225 charges were refuted "with the twelfth hand" by men of Bedford and Shrewsbury.<sup>5</sup> During the thirteenth century the crown pleas of the citizens of London were determined by thirty-six, eighteen, or six *purgatores*, according to the gravity of the offence;<sup>6</sup> and the procedure of London in such pleas was adopted as a model by Oxford and other towns.<sup>7</sup> In the courts of the Cinque Ports a charge of felony might be disproved with thirty-six helpers, of whom twenty-four were usually set aside or excused from swearing, and this practice still survived late in the fifteenth century.<sup>8</sup> At Fordwich, which was a member of the Cinque Ports, the buyer of stolen

<sup>1</sup> Select Pleas of the Crown, 39.

<sup>2</sup> Chartæ Hiberniæ, 13; Rotuli Chartarum, 211; Hutchinson, Cumberland, ii. 24. In 1232 the number at Waterford is twenty-four instead of twelve: Chartæ Hiberniæ, 22.

<sup>3</sup> Chartæ Hiberniæ, 24, 26; Baker, Scarborough, 30.

<sup>4</sup> Scott, Berwick, 247; Chartæ Hiberniæ, 36.

<sup>5</sup> Select Pleas of the Crown, 27, 115.

<sup>6</sup> Liber Albus, 57-59, 103-12. If the king was prosecutor, law was waged with six instead of thirty-six: Ibid. 91-92, 112.

<sup>7</sup> Liber Custumarum, 672; Roberts, Lyme Regis (1834), 25; Petyt MS., Inner Temple Library, No. 536, xiii. 225, xiv. 216-21 (Newton, Dorset; and Melcombe-Regis); and see the charters of Richard I. to Lincoln, Norwich, and Northampton, mentioned above, p. 696. In 34 Henry III. the royal justices permitted a citizen of Norwich to rebut an appeal of felony according to the custom of London, with thirty-six oath-helpers: Blomefield, Norfolk, iii. 48. Crown pleas of the burgesses of Great Yarmouth and Lynn were to be tried according to the law of Oxford: Rotuli Chartarum, 138, 175 (charters of King John).

<sup>8</sup> Lyon, Dover, ii. 269-71, 300, 301, 315, 347-8, 372-3; Woodruff, Fordwich, 231, 271; Hist. MSS. Com., vi. 544 (cases at Romney, 1475-76); Palgrave, Commonwealth, ii. 117-18 (cases at Winchelsea, 1435-41).

property could prove "with the third hand" that he bought it in good faith; the second time such property was purchased and claimed four conjurators were to be produced, and the third time twelve.<sup>1</sup> In the boroughs of Wales also we hear of the *sacramentum vicinorum* in connection with such *res furtiva* openly purchased.<sup>2</sup> Some towns of Ireland were allowed to follow the custom of Dublin as regards the trial of crown pleas.<sup>3</sup>

Many other documents bear witness to the prevalence of compurgation in the municipal courts of the thirteenth and fourteenth centuries in both criminal and civil suits. Thus many suits concerning debt, theft, assault, defamation, illegal trading, and other trespasses were tried in this way at Leicester, Exeter, Weymouth, Faversham, New Romney, Wallingford, and Andover,<sup>4</sup> and wager of law is expressly allowed in such cases by ordinances of London and Southampton.<sup>5</sup> For trespasses like assault without bloodshed and in pleas of debt, law was waged in London with six oath-helpers, in other towns usually with from two to five.<sup>6</sup>

The main qualification of compurgators was that they should be good and true men (*legales homines*) of the borough.<sup>7</sup> The Customal of Sandwich, speaking of the plea of debt, says that if any of them have been convicted of perjury, have performed public pen-

<sup>1</sup> Woodruff, Fordwich, 243-4 (fourteenth century).

<sup>2</sup> Charters of Carmarthen, 8; Placita de Quo Warranto, 820 (Cardigan); *Archæologia Cambrensis*, 1879, x. suppl. xxxvii., xlii. (Haverfordwest, Laugharne). As to the corresponding Anglo-Saxon custom, see Ine, c. 25, § 1.

<sup>3</sup> See the charters of Drogheda, 1229, Dundalk, 1379, and Athboy, 1407: *Chartæ Hiberniæ*, 20; Merewether and Stephens, *Hist. of Boroughs*, 776, 810.

<sup>4</sup> Records of Leicester, i. 88, 160, 204, 224, 275, 289, ii. 31, 179, 181, 185, etc.; Oliver, *Exeter*, 308, 315; *Hist. MSS. Com.*, v. 577-8, vi. 501-3, 541-2, 573-5; Gross, *Gild Merchant*, ii. 297-342. These cases extend from the first half of the thirteenth century to about the middle of the fifteenth.

<sup>5</sup> *Liber Albus*, 204, 294-5; *Hist. MSS. Com.*, xi. pt. iii. 9. The ordinances of London belong to the thirteenth or fourteenth century, those of Southampton to the year 1348. See also the customals of New Romney and Preston: Lyon, *Dover*, ii. 322; *English Hist. Review*, xv. 497.

<sup>6</sup> For pleas of debt, see *Liber Albus*, 204, 294-5; Records of Leicester, ii. 29, 158, 181, 184; *Domesday of Ipswich*, 170-72; *Hist. MSS. Com.*, ix. pt. i. 171; Records of Nottingham, i. 239, 355, ii. 341; *English Hist. Review*, xv. 304, 498, 507. At Nottingham law was sometimes waged for debt with the twelfth hand, as in the royal courts: *Ibid.* i. 151, ii. 19.

<sup>7</sup> *Liber Custumarum*, 321; Lyon, *Dover*, ii. 270, 315, 379; *Chartæ Hiberniæ*, 6, 12, 13, 22, 24, 26, 36; *Rotuli Chartarum*, 211 ("lawworthy men, neighbors and peers"). At Fordwich and Winchelsea conjurators may, however, be strangers or denizens: Woodruff, *Fordwich*, 271; Palgrave, *Commonwealth*, ii. 118; Lyon, *Dover*, ii. 379. The Anglo-Saxon laws also mention true or lawful men, neighbors, and peers: *Essays in Anglo-Saxon Law*, 297-8.



ance, or have conspired against their lord and have fled hither, or are fugitives for murder or theft, or if a son is produced to swear for the father or a servant for his master, or if a man is an enemy of the defendant, such persons cannot be admitted to prove or acquit upon a challenge.<sup>1</sup> At Leicester they were not to be men suspected or impleaded, but "good and lawful folk no way hired or accustomed to go to false oaths."<sup>2</sup> The municipal records present some curious details regarding the appointment of conjurators and the manner of administering the oath. At Ipswich in the thirteenth century it was customary for the defendant who denied a debt to bring into court ten men, who were divided into two equal groups, between which a knife was thrown, and the five toward whom the handle fell would sit aside, while the other five would remain with him who was to make his law.<sup>3</sup> At Leicester it used to be the custom in pleas of debt and trespass for the plaintiff to name the defendant's compurgators, but in 1277 it was enacted that "henceforth the defendant is to be at his law by as many as the court shall award of good and lawful men;" in some cases, however, the defendant sits between two persons whom he seems to elect as his oath-helpers.<sup>4</sup> If a freeman of the Cinque Ports was appealed of felony, he was required to produce thirty-six conjurators, twelve of whom were selected by the town officers to swear each by himself that the oath of the accused was true (*bonum et fidele*) and that he was not guilty; but if any of them will not swear unconditionally "the prisoner shall be dead."<sup>5</sup> In the trial of the crown pleas of London the *purgatores* were elected by "the mayor and citizens," but they could be challenged by the accused "for hatred or for kindred or for any other thing, and such person ought to be removed and another substituted." When the accused was content with the panel he took his oath, and six of his helpers swore that to the best of their knowledge and belief (*secundum scientiam suam*) his oath was true (*sanum et salvum* or *fidele*);<sup>6</sup> then

<sup>1</sup> Lyon, Dover, ii. 292.

<sup>2</sup> Records of Leicester, i. 159, 218 (A. D. 1277-92). According to Pollock and Maitland (English Law, ii. 634), there were such "professional swearers" in the king's courts at Westminster.

<sup>3</sup> Domesday of Ipswich, 170-72. In Anglo-Saxon times oath-helpers were sometimes chosen by lot: *Leges Henrici Primi*, c. 66, § 10.

<sup>4</sup> Records of Leicester, i. 158-60, 224, 275, 289.

<sup>5</sup> Lyon, Dover, ii. 269-71, 300, 301, 314-16, 347-50, 372-9; *Sussex Archæol. Collections*, xiv. 73-74, xviii. 51 (Hastings and Pevensey, 1356-57) Woodruff, Fordwich, 271-2 (fifteenth century).

<sup>6</sup> At Norwich also, in 34 Henry III., compurgators swear that they "believe" the principal's oath to be true: Blomefield, Norfolk, iii. 48.

he repeated his oath, and six more swore to its truth, and so on until the panel of eighteen or thirty-six was exhausted.<sup>1</sup> Before 1268 posthumous oaths of compurgators seem to have been accepted in London, for a charter of 52 Henry III. grants that the citizens may deraign themselves by oath in crown pleas "except that they should not swear on the graves of the dead as to what the deceased would have said when alive" — an exception which is also found in the charters of Lyme Regis, Melcombe Regis, and Newton.<sup>2</sup> Another interesting feature of procedure in London is mentioned in connection with pleas of debt and other personal actions: the defendant, if a stranger (*foraneus*), can make his law with the third hand that he owes nothing, and if he cannot find two helpers he shall swear in six churches nearest the gildhall that the oath which he took was good.<sup>3</sup>

We have noted some practices in the compurgatorial system of the boroughs which are evidently survivals of Anglo-Saxon usage, especially certain qualifications of the oath-helpers and the oaths on the graves of the dead and on various altars. The main points of divergence from Anglo-Saxon usage are the disqualification of kinsmen to act as compurgators<sup>4</sup> and a tendency in some towns to make compurgators mere "witnesses to character" in that they swear only as to their "belief" in the truth of the principal's oath. But in the Cinque Ports the older custom of swearing without reservation that the oath is true was maintained. Then, too, in Anglo-Saxon times the court seems sometimes to have selected the oath-helpers from a number of men chosen by the party offering proof,<sup>5</sup> as in the Cinque Ports, and perhaps in some cases his oath-helpers were named by his opponent,<sup>6</sup> as at Leicester and on

<sup>1</sup> Liber Albus, 56-59, 91-92, 103-5, 110-12. In "the great law" (*i. e.*, wager with thirty-six) the rule was changed so as to require the principal to swear only once. The same document, which is undated, also states that if any one of the thirty-six "should fail him or retract, then he (the accused) is a dead man:" Ibid. 111-12.

<sup>2</sup> Liber Custumarum, 252; Liber de Antiquis Legibus, 103; Roberts, Lyme Regis (1834), 25; Petyt MS. (Inner Temple Library), No. 536, xiii. 225 (Newton, Dorset), xiv. 216-21. For the *juramentum ad mortui tumulum* in Anglo-Saxon England, Wales, and Germany, see Ine, c. 53; Ethelred, ii. c. 9, § 2; Lea, Superstition and Force, 4th ed., 56.

<sup>3</sup> Liber Albus, 203. According to Fleta, ii. c. 63, the reduplication of the oath on nine altars was a common practice of merchants in England. For a similar custom among the Anglo-Saxons and Franks, see Alfred, c. 33, and Lea, Superstition and Force, 28.

<sup>4</sup> Some Anglo-Saxon laws even required that kinsmen should be produced as oath-helpers: Brunner, Rechtsgeschichte, ii. 380.

<sup>5</sup> Leges Henrici Primi, c. 66, § 9.

<sup>6</sup> Brunner, Rechtsgeschichte, ii. 383; but cf. Schmid, Gesetze, 566.

the continent ; but more frequently the chief swearer, in the Anglo-Saxon period, either freely elected them or took them from a number of men designated by the court. Finally, it should be noted that criminal charges could be refuted with the twelfth or thirty-sixth hand,<sup>1</sup> as in some boroughs of the twelfth and thirteenth centuries.<sup>2</sup>

IV. *The Jury*. — We have seen that in the boroughs of the thirteenth century compurgation was the most common method of proof in both civil and criminal pleas. Regarding its use in actions concerning burgage tenements, however, the sources at our disposal are silent. A clause of many early town charters prescribes that such actions are to be tried "according to the custom of the borough,"<sup>3</sup> but what that custom was in the twelfth century is not explained. Probably this clause was intended to afford protection not merely from the duel, but also from trial by royal assizes or inquests. Exemption from the latter (*nulla recognitio fiat in civitate*) is expressly granted to Bristol in 1188 and to Dublin in 1192.<sup>4</sup> That the burgesses disliked to have litigation concerning their tenements settled by inquests held in the presence of the royal justices is also demonstrated by other documentary evidence. In a plea of 6 Richard I. before the king's court the men of Marlborough assert that no "assize" ought to be taken concerning tenements in their town, and the Cinque Ports made a similar claim in the reign of John.<sup>5</sup>

The boroughs objected particularly to the trial of suits before the royal justices by writ of mort d'ancestor. King John granted the burgesses of Shrewsbury and Stafford that they should not be impleaded by this writ for any tenements in the borough, but that such cases should be determined by the law and custom of the borough ;<sup>6</sup> and the plea rolls of the thirteenth century show that

<sup>1</sup> Alfred and Guthrum, c. 3; Cnut, ii. c. 65; Leges Will., i. cc. 14, 15, 51; Leges Hen., c. 66, § 10, c. 92, § 11.

<sup>2</sup> For Anglo-Saxon compurgation, see Schmid, Gesetze, 564-7; Essays in Anglo-Saxon Law, 297-9.

<sup>3</sup> Stubbs, Select Documents, 108, 266-7, 310; Rotuli Chartarum, 5, 20, 45, 56, 79, 83, 91, 217; Chartæ Hiberniæ, 6, 12, 13; Hartshorne, Northampton, 25.

<sup>4</sup> Seyer, Charters of Bristol, 9; Historic Documents of Ireland, ed. Gilbert, 53, 59. This exemption was omitted in the confirmation charter granted to Bristol in 1252 (Seyer, 18), and in 1291 an assize was held before the mayor and bailiffs (Abbreviatio Placitorum, 286).

<sup>5</sup> Ibid. 6, 56. According to a charter of the reign of John, no assize was to be made in Kells except with the consent of the burgesses (Chartæ Hiberniæ, 17), but probably *assisia* in this passage means ordinance (*cf.* *ibid.* 85).

<sup>6</sup> Rotuli Chartarum, 142; Wm. Salt Soc., Collections, vi. pt. i. 287.

the application of the assize of mort d'ancestor to boroughs was regarded as an infringement of their rights.<sup>1</sup> In 1272 a tenant of Nottingham protests that he ought not to answer the writ, because, according to the custom of his town, a man or woman can freely give, sell, or bequeath his land or tenement, and therefore "no such writ runs concerning a tenement in the said borough."<sup>2</sup> Bracton also states that "in boroughs the assize of mort d'ancestor does not lie" concerning burgage lands, which may be sold like chattels, and Glanvill says that it is not usually applied to such lands.<sup>3</sup> Nevertheless, during the fourteenth and fifteenth centuries actions called mort d'ancestor could be brought in the courts of London, Dublin, and the Cinque Ports,<sup>4</sup> but we are not informed regarding the nature of the verdict returned by the jury in such cases, and probably this form of action was not much used in the municipal tribunals.

The assize of novel disseisin evoked less hostility, and in the thirteenth century the royal justices sometimes tried suits of this sort concerning property in boroughs.<sup>5</sup> But already in the reigns of Henry III. and Edward I. this assize, or rather a substitute for it "that men clepyn fresshe force," has a recognized place in the burghal courts;<sup>6</sup> and during the fourteenth and fifteenth centuries jurisdiction over such cases is expressly granted to many towns.<sup>7</sup> The citizens of London cherished the tradition that when Henry

<sup>1</sup> Somerset Pleas, ed. Healey, 167; *Abbreviatio Placitorum*, 6, 44, 56, 71, 102, 180, 285.

<sup>2</sup> *Ibid.* 180.

<sup>3</sup> Bracton, ed. Twiss, iv. 262-4; Glanvill, bk. xiii. c. 11; *cf.* Year Book 21 Edw. I., ed. Horwood, 70.

<sup>4</sup> Liber Albus, 197-8, 404; Lyon, Dover, ii. 273, 296-7, 360; Woodruff, Fordwich, 267. The action at Dublin is said to be "in the manner of mort d'ancestor." *Historic Documents of Ireland*, 254.

<sup>5</sup> Select Civil Pleas, 90-91; Bracton's Note Book, ii. 598, iii. 217; Wm. Salt Soc., Collections, vi. pt. i. 56; *Abbreviatio Placitorum*, 291. For a case in 1363, see Records of Nottingham, i. 181.

<sup>6</sup> Fleta, bk. ii. c. 55; Liber Albus, 109, 114, 195-7, 447; Domesday of Ipswich, 40-46; Johnson, Customs of Hereford, 16, 17; *Archaeol. Journal*, ix. 75 (*cf.* *English Gilds*, ed. T. Smith, 361); *Historic Documents of Ireland*, 242, 245, 432. For the fourteenth century and later, see Oliver, Exeter, 314; Royal Letters of Oxford, ed. Ogle, 44; *Chartæ Hiberniæ*, 85; Liber Assisarum, f. 232; Records of Nottingham, ii. 5, 35, 99; Lyon, Dover, ii. 272, 296, 360; Woodruff, Fordwich, 267; Fitzherbert, *Natura Brevium*, f. 7; *Registrum Prior. Omnium Sanctorum*, Dublin, ed. Butler, 44, 49. The burghs of Scotland also had an assize of fresh force: Innes, *Ancient Laws*, 165.

<sup>7</sup> Merewether and Stephens, *History of Boroughs*, 739, 742, 810, 813, 865, 885; Seyer, *Charters of Bristol*, 48-50; Johnson, *Customs of Hereford*, 57; Stevenson, *Cal. of Records of Gloucester*, 13; *cf.* *Rotuli Parl.*, iii. 24.

II. introduced the assize of novel disseisin they protested against its application to their tenements by the royal justices, and that their claim to be exempt from it was allowed.<sup>1</sup> The action of fresh force provided a remedy, without royal writ, for disseisin or intrusion by a bill brought within forty days after the force had been committed, the issue being tried by an inquest of twelve men.<sup>2</sup>

In boroughs, as in other franchised places, suits concerning the ownership of land were begun by a royal writ of right, and in many boroughs such suits were decided since the thirteenth century by a jury of twelve burgesses.<sup>3</sup> Fleta tells us that pleas could not be tried by the grand assize in royal cities and boroughs, because such towns belong to the ancient demesne of the crown and are not knight's fees.<sup>4</sup> A distinctive feature of this assize was the requirement that the jury should consist of knights; and the burgesses naturally desired that in litigation concerning their property the verdict should be found by their peers. Fleta's statement seems to conflict with a case which came before the royal justices in 1220, when the bailiffs of Kingston-on-Thames testified that "the grand assize lies in that town;"<sup>5</sup> but perhaps there was some doubt as to whether Kingston was a free borough,<sup>6</sup> and the proceedings suggest that there were towns in which the grand assize would not lie. In 1243 the burgesses of Wells asserted that this assize ought not to be held concerning their burgage tenements because a charter of King John made Wells a free borough.<sup>7</sup> In the usages of Winchester, ascribed to the thirteenth century, it is stated that the grand assize is debarred, but suits resulting from the writ of right are tried by a jury of twelve "good men;" and according to the Customal of Dover there could be no grand assize in that port.<sup>8</sup>

<sup>1</sup> Liber Albus, 114.

<sup>2</sup> "Nec locum habebit breve novæ disseisinæ in hujusmodi locis sed sufficit sola querimonia infra quadraginta dies a tempore disseisinæ factæ:" Fleta, bk. ii. c. 55. As to the period of forty days, see also Domesday of Ipswich, 40, 44; Abbreviatio Placitorum, 291; Charters of Carlisle, ed. Ferguson, 20; Chartæ Hiberniæ, 85. But in London it was forty weeks and in Dublin a year and a day: Liber Albus, 195; Historic Documents of Ireland, 432.

<sup>3</sup> Bracton, ed. Twiss, v. 86; Abbreviatio Placitorum, 291; Johnson, Customs of Hereford, 38; Liber Albus, 181; Liber Custumarum, 369; Domesday of Ipswich, 28-36; Archæological Journal, ix. 75.

<sup>4</sup> "Si autem breve de recto in hujusmodi curiis differatur, per duellum vel per magnam assisam non debet terminari," etc.: Fleta, bk. ii. c. 55. Cf. Statutes of the Realm, 1810, i. 218; for Wales and Kent, see *ibid.* i. 65, 225.

<sup>5</sup> Bracton's Note Book, ii. 75.

<sup>6</sup> It did not receive any of the characteristic franchises of a borough until 40 Henry III.: Roots, Charters of Kingston.

<sup>7</sup> Somerset Pleas, ed. Healey, 138.

<sup>8</sup> Archæological Journal, ix. 75 (cf. English Gilds, 361); Lyon, Dover, ii. 273.

On the other hand, at Ipswich in the time of Edward I. the tenant, after he had secured a writ of right, put himself on a jury "in the form of grand assize," but the four electors and the twelve jurors were "good and true men of the town."<sup>1</sup> So too in London an inquest of twenty-four freeholders of the city, summoned by officers of the civic court, decided petitory actions, which are said to be "in the nature of a grand assize."<sup>2</sup>

In pleas of debt and trespass, also, trial by jury was steadily gaining ground in the boroughs during the thirteenth and fourteenth centuries, and gradually tended to supplant compurgation. In some cases, especially in actions of debt, the defendant could choose one of these two modes of proof; in other cases there was a trial *per inquisitionem* by consent of the parties. In some towns wager of law retained a dominant position as late as the fourteenth or fifteenth century: for example, the Customal of Sandwich asserts that no inquest by neighbors can be held in the Cinque Ports.<sup>3</sup> In other towns trial by jury predominates before the close of the fourteenth century. In fact, owing to the diversity of local usage, it is difficult to generalize on this subject.

Some facts may, however, be presented to show that since the thirteenth century the general drift of development in burghal procedure was toward the displacement of compurgation by the jury. In London the latter was used in some criminal suits in the first half of Henry III.'s reign;<sup>4</sup> but in 1241 the royal justices obliged a person accused of crime who desired to put himself on the country to resort to "the great law," and they ruled that for the death of a man no freeman of London ought to put himself on a verdict of the citizens.<sup>5</sup> In 1249 and 1257 the citizens assert that the jury is lawful *ubi aliquis posset perdere vitam vel membra*, though they are opposed to its use in some other cases, and they regard the wager of law by thirty-six men as the normal method of disproving serious criminal charges.<sup>6</sup> In the first quarter of the fourteenth century, however, the inquest is on a parity with "the great law;" for at the eyre of 1321 it is contended on behalf of the city that any free-

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<sup>1</sup> Domesday of Ipswich, 32; cf. Bacon, *Annals of Ipswich*, 62.

<sup>2</sup> Liber Albus, 182-3, 448.

<sup>3</sup> "Infra libertatem quinque portuum non debet fieri aliqua inquisicio per vicinos prout alibi:" Boys, *Sandwich*, 452. But at Dover pleas of debt or trespass could be determined by an inquest: Lyon, *Dover*, ii. 278-9.

<sup>4</sup> Liber Albus, 89, 90. For the trial of strangers (*foranei*), see *ibid.* 102, 106-7; Liber de Antiquis Legibus, 10.

<sup>5</sup> *I. e.*, "ubi aliquis sequitur vel magna suspicio fuerit:" Liber Albus, 103-5.

<sup>6</sup> Liber de Antiquis Legibus, 17, 31-35.



man can rebut an accusation involving capital punishment either by twelve jurors or by thirty-six oath-helpers.<sup>1</sup> In actions of debt there seems also to have been a struggle in London between wager of law and trial by jury, and the former was still holding its ground during the first half of the fifteenth century;<sup>2</sup> but in pleas of trespass, such as bloodshed or battery, the inquest was required unless the plaintiff assented that the defendant might purge himself "by his law."<sup>3</sup> At Leicester it is enacted in 1277 that in pleas of debt the parties by consent may put themselves on an inquest, and in pleas of trespass the defendant may substitute a jury for oath-helpers; but in the first half of the fourteenth century compurgation seems still to be the more popular mode of proof.<sup>4</sup> The Domesday of Ipswich, compiled in 1290, ascribes much importance to juries in pleas of land, debt, contract, and breach of the peace; in contracts compurgation was debarred if either party desired proof by witness or by inquest, and a debt claimed by a tally without seal could be denied either by an inquest or by compurgation.<sup>5</sup> In the municipal courts of Norwich, Exeter, and Nottingham, men were condemned to death by a jury during the reigns of Edward I. and Edward II.<sup>6</sup> In 1321 ordinances were made for the abolition of evil usages in the civic court of Dublin in the trial of trespasses and cognate matters and for the future trial of such cases by lawful inquests.<sup>7</sup> At Southampton it was ordered in 1348 that if a plaintiff in an action of trespass swore that the damages exceeded forty shillings, the issue should be tried "by the country," otherwise by wager of law.<sup>8</sup> During the second half of the fourteenth century the dominant position of the jury in civil and criminal procedure is also visible at Canterbury and Nottingham.<sup>9</sup>

<sup>1</sup> Liber Custumarum, 321.

<sup>2</sup> Liber Albus, 203-4, 216, 222; Statutes of the Realm, 38 Edw. III., stat. i. c. 5.

<sup>3</sup> Liber Albus, 294-5; cf. *ibid.* 204. Pollock and Maitland (English Law, ii. 633) believe that this rule was made in Edward I.'s reign.

<sup>4</sup> Records of Leicester, i. 158-60 *et passim*. Compurgation was also very prominent at Andover in the fourteenth century: Gross, Gild Merchant, ii. 297-342.

<sup>5</sup> Domesday of Ipswich, 28-36, 46-48, 94, 106, 126; see also Bacon, Annals of Ipswich, 57, 88.

<sup>6</sup> Evidences — Town Close Estate, Norwich, 11; Oliver, Exeter, 307; Records of Nottingham, i. 84, 88, 102. In a case tried before the royal justices, 34 Henry III., a citizen of Norwich cleared himself of one accusation by a jury and of another by compurgation: Blomefield, Norfolk, iii. 48.

<sup>7</sup> Gilbert, Cal. of Records of Dublin, i. 235.

<sup>8</sup> Hist. MSS. Com., xi. pt. iii. 9.

<sup>9</sup> *Ibid.* ix. pt. i. 130; Records of Nottingham, i. 75, 85, 89, 103, 128, etc. For other indications of the prevalence of the jury in the fourteenth and fifteenth centuries, see Chartæ Hiberniæ, 50, 84; Cardiff Records, ed. Matthews, i. 34; English Gilda, ed. Smith, 389, 400.

It is evident that the general outlines of procedure in the borough courts of the fifteenth century, though still marked by archaic features, had been made to conform with the practice of the royal tribunals. This process of change, especially the tendency to substitute the jury for wager of law, kept pace with and perhaps was promoted by the gradual extension of municipal jurisdiction. The itinerant justices of the thirteenth century freely entered the boroughs to try crown pleas, and in the fourteenth century London and many other boroughs still had to endure these visitations, which, though not frequent, were very irksome to the burgesses and curtailed the authority of their courts.<sup>1</sup> But under Richard II. and his successors many towns were granted the right to have their own justices of the peace and to try all kinds of assizes and pleas, civil and criminal, though in some charters felonies are excepted.<sup>2</sup> Cognizance of assizes connoted trial by jury, and cognizance of serious criminal suits would, in course of time, reveal the inadequacy of compurgation as an instrument of justice. Thus the burgesses would naturally be inclined to adopt as a general maxim of litigation the ruling of Henry III.'s judges : *lex non jaceat sed inquisitio fiat*.<sup>3</sup>

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<sup>1</sup> Swinden, Yarmouth, 659-61; Historic Documents of Ireland, 210-11; Seyer, Charters of Bristol, 22, 46-78; Blomefield, Norfolk, iii. 65; Liber Albus, 51-107, 147, 296-8, etc.; Liber Custumarum, pp. lxxxiv.-c. The eyre held in London in 1321 lasted twenty-four weeks *in tribulatione et angustia*: Ibid. 382.

<sup>2</sup> Merewether and Stephens, Hist. of Boroughs, 125, 642, 813, 885, 891, 951, etc.; Blomefield, Norfolk, iii. 122; Davies, Southampton, 154; Drake, Eboracum, 205. Some boroughs had the right to try felonies already in Edward I.'s reign: Abbreviatio Placitorum, 254, 279; Domesday of Ipswich, 20; Bacon, Ipswich, 44, 57; Morris, Chester, 491; Oliver, Exeter, 307.

<sup>3</sup> Liber Albus, 90.



## A BRIEF INQUIRY INTO A FEDERAL REMEDY FOR LYNCHING.

**H**AS the United States power to protect the lives of its citizens, or the lives of resident aliens to whom it owes protection, against mob violence within the states, if the states fail to protect them?

Probably a majority of public men and constitutional lawyers, "under prepossession of some abstract theory of the relations between the state and national governments," as Mr. Justice Bradley once said in the Supreme Court,<sup>1</sup> will incline to answer this question off-hand in the negative.

An off-hand answer is not enough. The progress of mob-law in many of the states invites, if it does not compel, a serious inquiry into the constitutional question of federal power to put an end to it. This is not a sectional question, nor is it to be approached in a narrow or sectional spirit. The fact that the victims of lynching are usually of the colored race does not limit the importance or the object of the inquiry. It is not a race question, but one which affects the integrity of the government. Lynch law is actual and concrete anarchy; the one complete form in which anarchism appears in our midst. The United States cannot afford to tolerate it within the national domain if the power of prevention exists. It is idle to denounce anarchism in the abstract, or to punish by special laws the killing of presidents or other officers of government by anarchists, in a community where there is no system of laws adequate to protect the life of any and every person against mob violence.

The demoralizing effect of lynching upon the public moral sense is enough to compel attention to the subject, if there were no other reason for it. The practice is steadily increasing, by methods of progressive barbarity. When Hose was burned at the stake in Newman some two years ago, a cry of indignation went up from press and people in all parts of the country. Burning alive was comparatively a novelty, even in Judge Lynch's code of punishments. Since that occurrence many lynchings have been perpetrated by burning, and they have excited hardly a word of

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<sup>1</sup> *Ex parte Siebold*, 100 U. S. 371, 383.

public comment. Such statistics as have been collected, probably not full nor entirely accurate, indicate that there were more murders by mob violence within the states during the last year than in any year before, and that in but about one tenth of these cases was there even a charge of the peculiar crime to which lynching is sometimes considered especially appropriate.

As a legal or political question, the character or degree of guilt on the part of the victim of the mob cannot enter into it. If the guiltier man is lynched to-day, the less guilty may be to-morrow, and the innocent man the next day. In fact a substantial proportion of the victims are innocent of any offence. A mob cannot be trusted to determine this question, and often makes no attempt to determine it. It is less revolting if the mob kills the perpetrator of a heinous crime than if it kills for a trivial offence or no offence at all. But one case involves as much danger to the political system as the other. No civilized community can suffer vengeance to be wreaked or penalties to be visited upon any person by lawless violence. The possible consequences of tolerating such a practice do not need even to be suggested.

It is not agreeable to reflect that lynching, as the Chinese minister has pointedly reminded us, is peculiarly an American custom. It does not, and could not, exist under any other government in the world having any pretensions to be called civilized. Not in Spain, Russia, or even Turkey, are men and women burned at the stake by mobs, with or without charges of crime. The American states enjoy a complete monopoly of this distinction. The weight of public sentiment in every state undoubtedly is against it. The better element of the people in every state would prevent it. But for one reason or another the states do not prevent it, and it has generally been supposed that the federal government has no power to interfere.

A bill has recently been introduced in each house of Congress, designed to afford to citizens federal protection against lynching, in default of protection by the states.<sup>2</sup> In substance it provides, in section 1, that the putting to death of a citizen of the United States by a mob in default of protection of such citizen by the state or its officers, shall be deemed a denial to the citizen by the state of the equal protection of the laws, and a violation of the peace of, and an offence against, the United States; in section 2, that every person participating in such mob shall be deemed

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<sup>1</sup> 57th Congress, 1st Session, Senate No. 1117, House No. 4572.

guilty of murder and subject to prosecution therefor in the federal courts ; in section 3, that the county in which a lynching occurs shall be subject to a pecuniary forfeiture, to be recovered by action prosecuted by and in the name of the United States ; in section 4, that state peace officers who omit all reasonable efforts to prevent a lynching, and prosecuting officers who omit all reasonable efforts to bring the offenders to justice under the laws of the state, shall be deemed guilty of an offence against the United States and be liable to prosecution and punishment therefor in the federal courts ; and in section 5, that state officers having the custody of citizens of the United States charged with crime, who suffer them to be taken from their custody by mobs for the purpose of lynching, shall be deemed guilty of an offence against the United States and be liable to federal prosecution and punishment. Section 6 provides for the exclusion from juries, in such cases, of all persons whose character, conduct, or opinions are such as to disqualify them, in the judgment of the court, for the impartial trial of the issue.

Inquiry into the constitutional grounds for the exercise of such a power by the United States may begin by taking an analogous case. The United States, by international law and by treaty obligations, owes to foreign governments a duty of protecting their subjects resident within the states. So highly is this duty regarded by the law of nations that breach of it may be *casus belli*. Within the last five years, to go back no farther, the United States has several times been called to account for the killing of foreign subjects by mobs within the states ; although the practice of the state department has been, for prudential reasons, to disclaim any direct responsibility for these outrages.

Can it be doubted that the United States, having this duty of protection, and being answerable to the world for its performance, has power to perform it ? There can be but one answer to this question.<sup>1</sup> Whatever preconceived notions may have been, whatever the practice of the government may be, the powers of the United States are necessarily co-extensive with its lawful obligations. Where there is a recognized duty, there must be governmental power adequate to its discharge. Any other rule would make the government a name of reproach.

The early theory that the United States has no police power, so-called, or power to protect life or punish crimes of violence

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<sup>1</sup> See *Baldwin v. Franks*, 120 U. S. 678, 683.

within the states, is already superseded by judicial decision. It is now determined by the highest authority that the United States has such power, when a federal right or duty is invaded or involved. This principle is neither new nor startling, though modern applications of it have attracted attention. For example, it is now held that the United States, by the hand of its marshal, may lawfully kill one who assaults a federal judge travelling through a state in the course of his duty, and that the state cannot hold the marshal to account for such killing;<sup>1</sup> and that the United States may punish, as for murder, one who kills a prisoner in the custody of a federal officer within a state.<sup>2</sup> The principle is that the persons so assailed are within the peace of the United States; that the United States owes them the duty of protection; and that the power of protection follows upon the duty.

The equality clause of the Fourteenth Amendment forbids the states to deny to any person within their jurisdiction the equal protection of the laws. This clause is judicially held to confer immunity from any discrimination, as a federal right. The protection which the state extends to one person must be extended to all. It does not forbid discrimination merely in the making of laws, but in the equal protection which the laws are designed to afford. Forbidding the state to deny equal protection is equivalent to requiring the state to provide it. Equal protection is withheld if a state fails to provide it, and the guaranteed immunity is infringed. The constitutional requirement may be violated by acts of omission, no less than by acts of commission. The omission of the proper officers of the state to furnish equal protection, in any case, is the omission of the state itself, since the state can act only by its officers.<sup>3</sup> It would seem to follow that when a citizen or other person is put to death by a lawless mob, in default of the protection which the state is bound to provide for all alike, there is a denial of equal protection by the state, in the sense of the equality clause, which Congress may prevent or punish by legislation applying to any individuals who participate in or contribute to it, directly or indirectly.

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<sup>1</sup> *In re Neagle*, 135 U. S. 1.

<sup>2</sup> *Logan v. United States*, 144 U. S. 263.

<sup>3</sup> *Tenn. v. Davis*, 100 U. S. 257, 266; *Strauder v. W. Va.*, 100 U. S. 303, 306, 310; *Va. v. Rives*, 100 U. S. 313, 318; *Ex parte Va.*, 100 U. S. 339, 345; *U. S. v. Harris*, 106 U. S. 629, 639; *Civil Rights Cases*, 109 U. S. 3, 13, 23; *Ex parte Yarbrough*, 110 U. S. 651, 660 *et seq.*; *Yick Wo v. Hopkins*, 118 U. S. 356, 373; *Baldwin v. Franks*, 120 U. S. 683 and (Harlan, J.) 700; *In re Coy*, 127 U. S. 731; *Carter v. Texas*, 177 U. S. 442, 447.

The citizenship clause of the Fourteenth Amendment, by express declaration, creates and confers citizenship of the United States, as a federal right, upon all who are born or naturalized within and are subject to its jurisdiction. Formerly, citizenship of the United States within the States was understood to follow only from state citizenship. The Fourteenth Amendment directly reversed the conditions. Citizenship of the United States is now the primary right and status, proceeding directly from the federal government; while state citizenship is secondary and derivative from it. This effected a change in the relations between the United States and its citizens which has received little direct judicial consideration. The power to protect the lives of its citizens or subjects is an inherent power of every government. It was never doubted that the United States has this power, as a power necessarily implied, and may exercise it throughout the world outside the states. It is now judicially established, as above noted, that it may exercise such power within the states, for the vindication of federal rights or duties. The duty of a government to protect the lives of its citizens is correlative with the power. The citizen is entitled, as of right, to claim such protection. If the United States cannot exercise this power to its full extent within the states, it can be for no other reason than that it is reserved to the states, or to the people. In creating citizenship of the United States by the Fourteenth Amendment, there is no express reservation of this power. The established rule of constitutional construction now is that the United States has the powers commonly incidental to sovereignty except the powers expressly denied or reserved to the states or people, and all implied powers properly incidental to the powers granted. The Fourteenth Amendment expressly authorizes Congress to enforce its provisions, by appropriate legislation. Such legislation cannot, indeed, extend to establishing a complete code of laws. It must be limited to correction of the particular mischief resulting from violation of the Amendment. Legislation to protect citizens in their lives against mob violence, in default of such protection by the states, apparently goes no farther than to correct the mischief resulting from the default. It is difficult to see how it could otherwise be effectively corrected. It would seem that this must be regarded as appropriate legislation, if the express power to enforce the Amendment is to be made efficient.

It is now held that there is, in legal contemplation, a peace of the United States, existing within and throughout the states. It

seems to be judicially regarded as comprehending at least the existence, exercise, and undisturbed enjoyment of the rights derived from or under the United States.<sup>1</sup> If this can be taken as established, it would seem to follow that citizens of the United States, whatever may be said of other persons, are entitled to live in its peace, and to have it preserved for the protection of their lives. If the United States can legislate directly for the preservation of its peace within the states, the pending bill appears to be within its powers. If the power and duty to preserve the peace of the United States within the states belongs solely to the states, which it may not be wholly safe to concede, and which seems to be inconsistent with principles already established, the failure of the states to preserve it is a breach of duty toward the United States. In this view, it may be contended that the United States has power to deal with such a breach as an offence against itself, on the part of all individuals who contribute to it, directly or indirectly.

The United States has, as all governments have, a political and legal interest in the lives of its citizens. If it has not full power to protect them in their lives, within the states as it has elsewhere, it can be, as already observed, only because that duty rests solely upon the states. If so, it is a duty owed to the United States, as well as to individual citizens. It would seem that open and notorious neglect or omission of this duty on the part of a state, by suffering lawless mobs to murder citizens for want of legal protection, may be declared an offence against the United States, and if so, that the United States may punish all persons who contribute to it.

It may be said that if the United States has power to protect the lives of its citizens within the states, it must have power to protect their other personal and property rights, and so to supersede state laws by a system of federal legislation, which is impossible. This does not follow. There is no doubt that so far as the express provisions of the Fourteenth Amendment extend, federal legislation for its enforcement may extend, whatever the consequences. For example, if a state should omit to enact any legislation for the protection of a certain class of citizens against crimes of violence, forbidding and punishing such crimes only when committed against the other class or classes, it can hardly be doubted that Congress, under the enforcement clause, may supply the omission by direct legislation, or may perhaps annul the whole system

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<sup>1</sup> *Ex parte Siebold*, 100 U. S. 371, 394; *In re Neagle*, *supra*; *Logan v. U. S.*, *supra*.

of discriminating laws, leaving the state to provide others which will conform to the requirement of equality. The consequences of the failure of a state to enforce laws made for protection against violence are no less disastrous to the unprotected class than the failure of the state to make any such laws. It is difficult to perceive why the power and the duty of Congress to interfere, under the enforcement clause, are not as clear in the one case as in the other.

Apart from the Fourteenth Amendment, it may well be that the United States owes its citizens protection in their lives while not owing them a complete system of laws for the protection of all personal and property rights, and that its power is co-extensive with its duty, but extends no farther.

Without attempting an exhaustive inquiry into this delicate and difficult subject, it can safely be assumed that preconceived opinions are not conclusive of the question. In view of express constitutional provisions, and in the present state of judicial decision, the existence or non-existence of this power in the federal government can be determined only by submitting a statute to the test of judicial examination.

*Albert E. Pillsbury.*

BOSTON, February, 1902.



## SOME ACTUAL PROBLEMS OF PROFESSIONAL ETHICS.

THE books on professional ethics, with all deference be it said, deal somewhat inadequately with their theme. They do not solve the problems which, so far at least as my observation extends, most often present themselves for solution, and the problems which they do discuss are treated with hardly sufficient care in analysis. The law schools usually ignore the subject, and attorneys actively engaged in their profession follow such a diversity of theory and practice that in many matters of considerable moment and frequency there can hardly be said to be even a custom. The natural result of these conditions is that there is no well-defined professional standard to which attorneys can resort in cases of doubt, and therefore each attorney meets the questions which come to him — and they come to all — with only such light as an untrained instinct can supply. The need of a reasoned theory of a lawyer's duty, illustrated and made vivid by actual experiences, seems to me, therefore, to be not the least of the many needs of the time. It is in the hope of contributing something to the elucidation of one very extensive class of professional problems that I have written the following pages. It may be added that all the questions discussed and all the illustrations used have come to my attention in one way or another in the actual practice of my profession and may, I believe, be fairly taken as typical of the general experience of lawyers.

I may be pardoned a brief preliminary analysis of the relation between attorney and client: it is necessary both to the definition of the immediate subject of the article and also to the clear comprehension of the point I shall try to make.

The primal fact, then, upon which the relation of attorney and client is based is that on the one hand the lawyer seldom, if ever, undertakes to bring about a definite result, such, for example, as the attainment of a particular kind of relief in a particular litigation, but that on the other hand he does undertake to devote his best judgment to those matters which may be intrusted to him. Viewed from that standpoint, his undertaking falls into that large class of contracts which import what is called a fiduciary obligation. The receiver, the trustee, the guardian, the director, the



agent, the confidential secretary, in a word, the fiduciary of every character, whatever else he may promise, makes at least that pledge of his best judgment, and it is the confidence reposed in his judgment that gives both worth and dignity to his employment. Every fiduciary, therefore, should understand that when he allows his judgment to become impaired, he is not only committing a breach of contract, but he is committing a breach which involves in a peculiar and special degree his personal honor as a man who may be trusted.

Because the principal element of the fiduciary's employment lies in the pledge of his judgment, it follows that the principal temptations which he meets lie in those influences which tend to impair his judgment. These are legion and they range from strong drink to adverse interests. It is the adverse interest as affecting particularly the lawyer that I propose to consider in this article.

Before entering directly upon the subject, let me plead for its general importance. It is part of a larger subject of which the limits are not easily set. At any rate they far transcend the mere relation of lawyer and client and include the whole field of fiduciary employment in the community at large. The grosser forms of fiduciary wrongdoing, such as bribery, are well known and well understood, and are therefore to a considerable degree susceptible of prevention or remedy. In the subtler forms, however, which are not so well understood, and the effect of which is not so plainly visible, a great danger lies. Indeed, I hold it to be but a fair and moderate statement to say that the surrender of judgment by fiduciaries to interests adverse to their duty is the chief evil of our day. It is a commonplace of criminologists that the crimes of violence which characterized the elder ages have largely given way to crimes of fraud in the younger. It is not so clearly a commonplace, and in fact it will probably be questioned, and yet I believe it to be true, that what are usually regarded as crimes of fraud mainly consist, not in deceit, but in the breach of fiduciary contracts through the surrender to adverse interests.

The evil permeates all grades of society. Those transactions which we euphemistically term getting a rake-off, or making something on the side, or the like phrase, very usually involve it. The cook receives a rake-off from the butcher; the janitor gets a similar rake-off from the coal dealer; the insurance agent, who is the agent of the insured, gets his commission from the insurance company; the marine adjuster, who is supposed to be an impartial arbitrator of losses under marine insurance, makes a little on the

side from the shipowner whose losses he is supposed to determine; the purchasing agent gets a commission from those from whom he buys; the doctor shares in the profits of the druggist whom he recommends to his patients; the lawyer gets a rebate from certain corporations to whom he brings his clients' business: and so the list might be indefinitely extended. In the regions of great corporate transactions the same conflict between voluntarily assumed duties and adverse interests reappears, though often in far more complex and obscure forms. The familiar case of two corporations dealing with each other, with one or more directors common to both, presents it. The president of a great insurance company becomes a director of a bank which expects to extend favors to the company, and a big manufacturer or a shipper will get preferential rates from a railroad of which he happens to be a director. The frequent, we might almost say usual, custom of electing directors to represent a particular clique of interests instead of the stockholders as a body is a very subtle and not often recognized form of the evil. In general it is through the custom just alluded to that large incorporations are "controlled." In political life the surrender to adverse interests furnishes the great bulk of those crimes which we lump indiscriminately under the head of political corruption. The policeman, bound to protect the citizens at large, receives a little something for allowing some particular citizen to encroach upon the sidewalk; the police captain levies tribute for permission to maintain public nuisances, like houses of ill-fame; the city commissioner lets contracts to a friend of the boss; boodle aldermen grant street railway franchises; "hayseed legislators" introduce "strike bills;" even Presidents of the United States appoint fourth-class postmasters "for the good of the organization." Even into the realm of the administration of justice, the same corruption finds its way. For a very petty and contemptible form of it, witness the referee who accepts a portion of fees from the stenographer whom he appoints to take the testimony offered before him. A more serious matter is that judges who are to appoint referees are guided by political considerations and appoint men of their own party stripe, and the sight of courts dividing in political cases along political lines is altogether too familiar. In each and every case thus cited, analysis will disclose a fiduciary who has pledged his judgment to the service of one individual or group of individuals, but who has allowed it to be diverted to the service of others for the sake of some benefit, immediate or remote, accruing to himself.

A large element of the danger inherent in these practices lies in the complacency with which they are viewed by the community. To say nothing of laymen, even the courts are infected with it. In the actual administration of justice at the present time the equity rules, which were evolved in earlier and less sophisticated days, but which were, and are, wholly adequate to deal with these wrongs under whatever form they may present themselves, are too often distinguished or found inapplicable to the case at bar. Something of the old righteous indignation of the chancellors has passed out of our modern jurisprudence.

These preliminary illustrations and comments are quite irrelevant, but they will serve to emphasize a point of view which to my mind needs emphasis. Therefore I shall not apologize for them, but instead will examine in their light what may well prove to be the first occasion upon which a young lawyer will meet this form of temptation. When he searches a title, and comes to the question of insuring it, he will find the title companies promising him sums ranging from ten to twenty-five per cent. of their advertised charges in consideration of his bringing them the business. If he yields to temptation, the worst form that the transaction will take will be this: he will charge his client according to previous agreement a fixed sum, perhaps one per cent. of the purchase price of the property, as his fee, and in addition will require his client to pay his expenses; the latter will include the sums paid for insurance of the title; these being paid to him at the closing of the transaction, he will either pay the insurance company the full amount of their advertised charges, receiving back his percentage, or he will merely pay the difference between the two. In either case, his client, who knows nothing of the rebate (this we are entitled to assume as being the worst form of the case, and indeed it is likely to be true, except among those comparatively few landowners who have numerous transactions), will pay him the full amount of the company's charges upon his representation that he has paid them over in their entirety. This is a representation which is untrue in fact and which constitutes intentional deceit of the client.

In a milder form, the lawyer agrees to examine the title for a fixed sum, out of which he engages to defray all the incidental expenses, including the cost of insurance. In such a bargain the client of course understands that the lawyer will reduce his expenses to a minimum in order that his profit may be a maximum. If the client knows of the rebate, the transaction is unexception-

able, of course ; but if he does not know of it and supposes that the lawyer will have to pay the advertised charges in full, then the situation is that he has made a contract with his own trusted adviser in which he is ignorant of a material fact. Is the lawyer prepared to affirm that if the client had had full knowledge of the rebate, he would not have insisted upon getting some benefit from it himself ? In spite of this possibility, almost all attorneys will argue that since, under the arrangement as actually made, the amount of profit which the lawyer is to make has been left by the client to the lawyer himself, it becomes of no concern to the client how great or how little that profit may prove to be. The argument might have force if the lawyer were dealing with his client as a merchant deals over the counter with his customer ; but even so, an element enters into the transaction which it quite ignores. There is always a choice among insurance companies, and the client is entitled to be advised by his lawyer as to the one which, under all the circumstances of the case, will be most advantageous. This question may depend upon a variety of circumstances, the solvency of the company, its carefulness in the examination of titles, its courtesy in dealing with its customers, and many other matters which might be mentioned. The lawyer, however, will be influenced by the prospect of his fees, and that company will be most likely to deceive his patronage which pays him the largest rebate. Therefore the lawyer has put himself in the position of deciding his client's matters according to his own personal interests.

The practice of the title companies in this matter is so universal that it cannot be expected to change in a day ; but this very circumstance will enable the lawyer, if he so desire, to turn it to honest ends. Let him inform his client at the outset that the rebate is proffered, and then, arranging for a fee that is satisfactory to both, promise either to pay the rebate over to the client or to credit it on the bill for services. If he is Quixotic in his honor and scorns to deceive even his tempter to deceit, he will disclose to the company the ultimate destiny of the rebate.

The question presented by this case is not by any means confined to title companies. The lawyer will meet it at every turn : public accountants will seek his patronage on a promise to divide their fees ; auctioneers and brokers of all kinds will make him the same offer ; lawyers in other jurisdictions who desire his foreign business will unite in the chorus ; even trust companies, themselves fiduciaries, will ask him to procure their nomina-

tion as trustees in his clients' wills upon the assurance that they will continue to retain him as adviser in the affairs of the estate; and so it goes.

It will not be possible, if it were advisable, to enumerate all the forms in which this temptation comes. I will instance another, however, both because it is not uncommon, and because it involves a more complicated analysis. Lawyers are frequently appointed trustees in bankruptcy. Under such circumstances, in spite of their profession, it is eminently proper that they should retain counsel to advise them. They assume with the office important duties and liabilities which, because they intimately affect themselves as interested parties, it would be unsafe and unwise for them to assume without the aid of independent advice. Moreover, the administration of almost every bankrupt estate requires services which are quite without the pale of the trustee's duties and for which, if he should attempt to perform them himself, he could not obtain compensation. Whom, then, shall he retain as his counsel?

It frequently happens in these proceedings that one attorney represents a majority of creditors and is therefore in a position to dictate the appointment of the trustee. Suppose that under such circumstances he offers the post to some legal friend provided he be himself retained as attorney. Now, in considering this offer the proposed trustee must remember that his judgment will be pledged to the service of all the creditors alike and indeed, what in actual practice is too often forgotten, that he will become a fiduciary for the bankrupt himself. If the estate should by any chance prove more than sufficient to pay all the creditors in full, it would be his duty to restore the surplus to the bankrupt, and in all cases it will be his direct duty to the bankrupt to see that the estate realizes as much as possible. Among these various beneficiaries of his trust, the interests of the different parties may well prove to be strongly antagonistic, and it will become his duty to preserve among all these contending interests the even balance of the strictest impartiality. Under such circumstances to employ the attorney for particular creditors and to follow his advice may be to take action which will benefit some creditors at the expense of the others. For a not uncommon illustrative example, let us suppose that on the eve of his bankruptcy the bankrupt has made large purchases of goods on credit. Under ordinary circumstances the merchants who sold the goods would come in as simple creditors; but suppose, further, that the bankrupt had made immediate sales

of these self-same goods over to some third persons, partly for cash and partly for credit, and, pocketing the cash, had left the outstanding credits as assets of his estate. Under the latter supposition, it is almost inevitable that the merchants who originally sold the goods will seek to have the sales set aside and to recover the goods, even from the hands of the third parties, on the ground of fraud on the part of the bankrupt in misrepresenting his financial condition. On the other hand, it would be quite likely that it would be for the interest of the creditors at large to have the trustee defend the transaction and collect the unpaid balance still owing from the last vendees. In any event, the question is obviously to be determined only after careful inquiry ; and to follow the advice of an attorney who is interested by reason of his prior retainer to secure a particular decision of it is, with equal obviousness, to be recreant to the creditors at large. In general, therefore, an offer such as we have supposed should be looked at askance, and should not under any circumstances be accepted without a full disclosure of the facts to the court or referee in charge of the proceedings and, if possible, to the creditors.

If the trustee is a member of a firm of lawyers, should he retain his own partner, and if so, should the partner turn his fees into the partnership fund, so that the trustee will receive his share of them? The principle involved in these questions is not confined to the matter of bankruptcy : it extends to every case in which the lawyer is an executor, trustee, guardian, receiver, or other fiduciary in which he himself requires legal advice.

Of course, when a fiduciary seeks advice he is, by virtue of his obligation, in duty bound to secure the best advice. This does not mean that he is to retain the leader of the bar in every trivial matter ; but it does mean that he is to exercise his best judgment on all the considerations involved in the choice. Now the partnership relation in itself involves great personal confidence and esteem among the associates, and so it will usually happen that the lawyer to whom the trustee would most naturally turn would be his own partner. Consequently, if the trustee does in fact possess that trust, it is entirely proper that he should retain his partner : there is nothing in the partnership relation inconsistent with his obligation as trustee.

With the question of sharing in his partner's fees, however, very different considerations arise. If we assume that if it were not for the fees the trustee would retain somebody else, we have a clear case of a judgment swerved from its duty by pecuniary



considerations. But suppose the trustee insists that he would retain his partner in any event, whether he shared in the fees or not, and that therefore in accepting them he does not violate the obligation to use his best judgment in the slightest degree. Does he not in that case live up to the very letter and spirit of his obligation?

I am far from having the hardihood to deny that a trustee may sometimes say to himself in all human certainty that his judgment would have been the same, fees or no fees. Human experience, however, has evolved a theory of inferences known as the burden of proof. Succinctly stated, it is that under some circumstances the inference from given facts is so strong that it will be assumed to be true unless it can be proved to be untrue. The theory is known to every lawyer: it is used in every trial. It far transcends the narrow confines of the courtroom, however. It enters into every relation of life and in particular it has become a rule of conduct. As such it means that the honest man will not put himself into an ambiguous position, a position, that is to say, where the probable inference will be derogatory to his character, even though it be not justified in fact. When it is applied to lawyers, it becomes the rule that the lawyer's fidelity to his client's cause should be, like Cæsar's wife, above suspicion. In this view, the lawyer who carries the confidence of his clients as a precious trust and who is unwilling that it should be compelled to draw upon itself in order to acquit him of suspicion, will not, in the supposed case, share in his partner's fees. He will refuse to put himself in that ambiguous position.

There is one case which may present difficulties to the conscientious lawyer and that is the case where the client himself puts him in a position to be tempted. For example, when the owner of land applies for a loan and offers a mortgage as security, the proposed lender naturally requires the title to be first examined by his own attorney, and also requires the expenses of the examination to be borne by the applicant. Hence has arisen the universal custom that the lawyer for the mortgagee examines the title and that his fees are paid by the mortgagor. Now if, as often happens, the matter of lending the money is also confided to the lawyer, the fees for examining the title may become a consideration in the matter of lending the money, and the lawyer may find himself tempted, as between two proposed loans, to regard the worse as the better security, because it carries with it the larger fee. Under such circumstances, he can only do his best: if possible,

let him talk it over with his client, for there, as always, he will find the surest refuge. Above all, let him not complacently regard himself as temptation-proof. If he does, he will run counter to the unbroken experience of the ages, and will assume in himself a supra-human strength which has often been imagined but never realized. The greater his real power to resist, the more frankly will he acknowledge the power of the temptation.

Hitherto we have looked only at the lawyer who is to be paid by the adverse party; but in many of the instances which we have supposed it will be noticed that the adverse party is himself a lawyer, and consequently we must consider the ethics of his position. If, for example, it is not right for a lawyer to share in the fees which he is to pay his legal correspondent in another jurisdiction, what is to be said of the correspondent who offers to share them? The wrong of receiving lies, as we have seen, in the breach of the lawyer's contract to devote his impartial judgment to his client's service; but the lawyer who pays, not having made that contract, cannot commit a breach of it. What he does do, however, so far as he does anything, is to offer the inducement to a breach.

There is a large class of cases in which one person induces another to commit a breach of a contract to which he is not himself a party. They have never, so far as I am aware, at least in our jurisprudence, been correlated under one title, and indeed the nature of the wrong, and even whether or not it is a wrong, has at times been deemed, singularly enough, a doubtful question. The substantive law, however, although not wholly satisfactory, has not been quite so lax as might possibly have been expected, and has as a matter of fact in most cases worked out a remedy, even though it has been deficient in theory. For example, when the one who owes the duty is a public servant, and the offending party offers him a valuable consideration, the criminal law will step in with an indictment for bribery. When the contract is marital and a third person induces one of the parties to violate it, the civil law will afford the remedy, such as it is, of an action for alienation of affection. If one entice away my servant, I may have an action against him for loss of services. If A agree to sing at my theatre, and B, knowing of that agreement, induce her to sing at his, I may enjoin both A and B. If A contract to sell me a specific parcel of land, and B, knowing of that contract, induce A to sell it to him, I may by bill in equity compel B to reconvey it to me. And so the list might be extended indefinitely, but the underlying principle is one and the same in all these cases, that one man has no



right to induce another to default in his duties to a third, and that the wrong will, if possible, be prevented, undone, or punished. That what is thus a wrong at law is a wrong in ethics, too, will hardly be denied. That, then, is the ethical judgment which we must pass on the lawyer who offers to share his fees in consideration of receiving the business. We must, of course, pass the same judgment on title companies, trust companies, accountants, and the other gentry whom we have found following these customs.

There are tendencies involved in the practices of which I have complained which, over and above the injury to the client, react injuriously both on the lawyer and on his tempter. Let me illustrate by an example drawn from another profession. The custom is universal that an insurance broker shall receive his compensation from the insurance company in the form of a percentage of the insurance premiums, and yet he is supposed to be the agent of the insured and not of the company. In other words, he has pledged his judgment to the service of the insured, he has made his acts and representations the acts and representations of the insured, and his compensation comes from the insurer. We have thus on a large scale a profession which owes its duty in one direction and receives its compensation from another, and consequently a profession whose interest conflicts throughout with its duty. How large a proportion of the difficulties which surround the insurance business and which affect both the insurance companies and the insured is due to this anomalous position of the broker is perhaps difficult to say; but that it is very large nobody, least of all the companies, will deny. Both brokers and companies are restless under the practice. I may point out the effect of the anomaly on the brokers themselves. The business, instead of being one of confidence and trust, as the business of an agent should be, has become a business of mere rate-cutting and, anomaly of anomalies, of paying back to the insured a percentage of the commission received from the insurer. Brokers even go so far as to attempt by agreement to regulate the percentage of that re-rebate, so to speak, and one of their serious difficulties is created by those brokers who break the agreement. I have had a broker complain to me that the insured was no longer loyal to the broker, but was governed solely by the question of his premiums; but the reason is obvious: the broker long since ceased to be loyal to his client, and can hardly expect his client to be loyal to him. Perhaps the most prominent of all the effects, however, is the ill name attached to the profession and the lowering of quality in the *personnel* of its followers.

I believe something of the same effect may be traced into the profession of the law through the extension of similar methods. It is a frequent observation that the practice of the law is taking on, especially in the large cities, a distinctly commercial character. I believe this matter of rebates and rake-offs has something to do with the change. Clients are not wholly ignorant of these things, and just in proportion to the increase in their knowledge is the decrease in their confidence. Then follows the commercialization of the relation, the lowered standards and *personnel*.

Out of all these considerations and analyses we may evolve a practical rule which lawyers can prescribe to themselves as a rule of thumb to govern their relations with their clients. It must be taken as a rule of thumb only, that is to say, only as a practical, offhand method of deciding doubtful points. It must not be allowed to take the place of a clear understanding of the back-lying reason. That, of course, in the ultimate analysis is the only criterion, and only the lawyer who grasps the fact that he has pledged his judgment to the service of his client and must keep it unimpaired and in training, so to speak, has the real substance of the matter, or the real guard against disloyalty. The rule of thumb, however, is this :—

*If possible, do not receive any compensation in your client's business, except from your client himself; but if circumstances compel you to break the rule, tell your client what you receive.*

The significance of the second clause perhaps needs explanation. The lawyer is often tempted to think that after all it is none of his client's business how much he has received. When that happens, he may be sure of three things: he may be sure, in the first place, that it is his client's business; he may be sure, in the second place, that he is afraid to tell his client; and he may be sure, in the third place, that he is engaged in the pleasing, but futile, process of self-deception in trying to suppress a consciousness of unfaithfulness which will not be suppressed. The willingness to tell his client how much he has received will therefore serve as a very effective practical test of his own courage and loyalty.

This whole discussion may be summed up in a few words: let the lawyer remember that he is the recipient of a personal trust of which he may be justly proud, and, so remembering, let him be animated by that spirit which in all ages and in all climes, among savage and civilized races alike, has been the distinguishing mark of the gentleman — scorn to betray a trust for profit.

*Everett V. Abbot.*

NEW YORK, March 11, 1902.

## THE ISTHMIAN CANAL TREATY.

THE object of isthmian canal negotiations between the United States and Great Britain, during the past few years, has been to facilitate the construction of an inter-oceanic waterway under the auspices of our own government, by the removal of obstacles arising from the Clayton-Bulwer treaty of 1850, without impairing the principle of neutralization established in that convention. It is worth considering whether the new treaty recently ratified by the Senate provides adequate means for the accomplishment of that end.

On February 5, 1900, the President submitted to the Senate for ratification the convention popularly known as the Hay-Pauncefote treaty.<sup>1</sup> By the terms of that compact our government was given the right to construct the canal under its own auspices, together with all the rights incidental to construction, as well as the exclusive right to regulate and manage the waterway. Elaborate preparations were made for the neutralization of the canal according to the provisions of the convention of Constantinople of October 29, 1888, providing for the neutralization of the Suez Canal. The waterway was to be free and open in time of war, as in time of peace, to the vessels of all nations, without discrimination. The canal was never to be blockaded, nor was any right of war to be exercised within its waters, or within three marine miles of its termini. The United States was, however, to be permitted to maintain a force of military police necessary to protect the canal against lawlessness and disorder. Precise regulations were also made with reference to the transit of vessels of war, prizes, and troops of a belligerent. The plant and all works incidental to the canal were to enjoy complete immunity from attack. Fortifications commanding the canal or adjacent waters were prohibited. Finally, it was agreed that the high contracting parties should bring the convention to the notice of the other powers and invite their adherence to it.

Much criticism was heaped upon the Hay-Pauncefote treaty when that instrument was submitted for ratification. The amendments made by the Senate indicate the general nature of the objections.

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<sup>1</sup> See 14 HARV. L. REV. 52.

There were three amendments. The first was of slight importance and consisted merely of the insertion of the words "which convention is hereby superseded," following a reference to the Clayton-Bulwer treaty. The second declared that the preceding stipulations with reference to the neutralization of the canal should not "apply to measures which the United States may find necessary to take for securing by its own forces the defense of the United States and the maintenance of public order." The last struck out the agreement to invite other nations to adhere to the convention. In its altered form the treaty was unacceptable to Great Britain.

With this analysis of the treaty of 1900 in its original and amended form it is possible to examine the more intelligently the provisions of the new treaty signed by Mr. Hay and Lord Pauncefote November 18, 1901, and ratified December 16, 1901. The preamble is like that of the treaty of 1900. It is there stated that the purpose of the negotiators is to facilitate the construction of a canal under the auspices of our own government without impairing the general principle of neutralization. The first article comprises a frank statement that the Clayton-Bulwer treaty is superseded by the new convention. In the second article provision is made, in terms identical with those employed in the earlier treaty, for the construction of the waterway by the United States.

The third article, however, in its plan of neutralization differs somewhat from the corresponding article in the earlier treaty. It is here stated that the "United States adopts" as the basis of neutralization the rules embodied in the Constantinople convention. This is in contrast to the language of the original Hay-Pauncefote treaty in which it was declared that "the high contracting parties adopt" the rules. This change, however, is merely verbal; it does not alter the original plan. Great Britain as well as the United States by assenting to the treaty may be said to adopt the scheme of neutralization.

A conspicuous change in the new treaty is the omission of the sentence, "No fortifications shall be erected commanding the canal or the waters adjacent." This is the only prohibition contained in the earlier treaty which is not embodied in the new. The treaty of 1900 contained the provision that the waterway should be "free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations, on terms of entire equality." In the new treaty the words "in time of war as in time of peace" are omitted, and it is further provided that the canal shall be open to the vessels of "all nations observing these rules."

The new treaty is free from the provision attached to the earlier convention of 1900 on the recommendation of the Senate Committee on Foreign Relations, by which the United States was not to be prevented by the several prohibitions from taking such measures as it might find necessary "for securing by its own forces the defense of the United States and the maintenance of public order."

Article four of the new treaty was not contained in the convention of 1900 in its original or amended form. It is here provided "that no change of territorial sovereignty or of international relations of the country or countries traversed by the before mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty."

Having thus indicated the provisions of the treaty of 1901 in contrast with the terms of the original and amended conventions of 1900 it is possible to examine the obligations which the United States has now placed upon itself. These obligations naturally divide themselves into two classes. They are those of our government, first, with respect to Great Britain, and secondly, towards other powers. Under the first class the question arises whether the United States if at war with England would have the right to fortify the Isthmus, and by committing warlike acts in or near the canal prevent the transit of British warships. It has been noted that the treaty of 1901 contains no express prohibition of the right to fortify the Isthmus. This omission, however, seems to be of little moment. It could not be seriously maintained that our government secured the right to fortify as incidental to the right to "maintain such military police along the canal as may be necessary to perfect it against lawlessness and disorder." A police force may at times resort to temporary barricades, but it never depends upon permanent works. Its function is not to engage a foreign enemy but to check local disturbances. Its adversaries are for the most part individual offenders. A fortress is an instrument of war. It best serves its purpose when pouring shot upon an approaching enemy. In the event of war between the United States and Great Britain the erection of a fortress in the Isthmus by our government would be a step towards war and an act repugnant to the general principle of neutralization. The several specific prohibitions of the exercise of rights of war in the canal are broad enough to include by implication a prohibition of the erection of fortifications. All such acts in the vicinity of the canal stand on the same footing. The mutual agreement of the high contracting parties

to abstain therefrom signifies that our government has placed upon itself the obligation never to commit an act of war against Great Britain in or near the waterway. Both nations, by the recent treaty, have dedicated the canal as a spot to be forever remote from scenes of Anglo-American conflicts should any unhappily occur. For that reason our government could not rightfully attempt to thwart by force of arms the transit of British warships though bent on errands hostile to the United States. Our obligation not to do so would be a real one because resting upon the agreement willingly entered into. The existence of that obligation would not be jeopardized by the possible absence of a strong arm capable of enforcing it.

The obligations of the United States with respect to nations other than Great Britain are based on somewhat different grounds. These should be examined with reference, first, to states not consenting to the rules set forth in the treaty and indifferent to the plan of neutralization; and secondly, to states approving the plan and willing to respect the prohibitions contained in it. The question, therefore, first arises whether our government on account of the second Hay-Pauncefote treaty has imposed upon itself an obligation not to commit acts of war in the isthmian waters against a state not consenting to the neutralization rules; and consequently, whether the United States can rightfully seek to prevent by force of arms the transit of the ships of such a power through the waterway. The intention of the negotiators of the treaty was to provide a feasible plan for the neutralization of the contemplated canal. A neutralized interoceanic waterway is one which owes its peculiar status, that is, its isolation from scenes of war, to the consent of the several nations interested in the project, rather than to the determination and power of any single state, or the agreement and strength of two states. It is obvious that without its own consent the right of a nation to exercise acts of war in a certain locality cannot be completely forfeited. Would it, therefore, be reasonable to conclude that our government, by its agreement with England, has abrogated the right to commit acts of war in a certain locality against a nation still possessing that right? Would the several prohibitions of hostile acts embodied in the treaty in any sense estop the United States from asserting the right to disregard them in its dealings with such a nation? It is impossible to answer these questions affirmatively. It is difficult to discover on what ground a state not consenting to the plan of neutralization could object to acts on the part of our government



inconsistent with that plan. Nor is it evident on what theory England herself could object to such acts by our government. The Hay-Pauncefote treaty is but the first step taken by the signatory powers to affix to the waterway a peculiar status which could only become permanent and secure by the consent of the other powers. The express prohibitions of warlike acts merely indicate the object in view and the precise nature of the status sought to be ultimately attached to the canal. They do not in any way measure the rights and obligations of the United States with respect to non-signatory and non-consenting states. They are not declarations to the civilized nations of the world that the United States and Great Britain have forever relinquished their rights to attack their enemies in isthmian waters under all circumstances. The treaty itself is evidence of the intention of the high contracting parties on this point. According to the terms of section one of article three "the canal shall be free and open to the vessels of commerce and of war of all nations observing these rules." The "observing of these rules" concerning neutralization is the condition upon which the other powers are given the enjoyment of the right of transit. If only such are to enjoy that right it follows that the high contracting parties reserve the right to prevent as they may see fit, and by force of arms when necessity so demands, any non-consenting states from sending their vessels through the canal. How far the United States would deem it wise to exercise that right the exigencies of the hour could alone determine.

The insertion of this condition was peculiarly fortunate and vitally important in view of the omission of the article contained in the first treaty providing for the invitation of the other powers to accede to the plan of neutralization. The question at once arises as to the obligation of our government toward a nation other than England observing the rules of neutralization and acquiescing in the plan set forth in the treaty. By the terms of the Hay-Pauncefote treaty the United States and Great Britain expressed the desire to dedicate the contemplated waterway as a neutralized canal for the benefit of all maritime states evincing a like desire. Both nations declared their willingness to abrogate all rights to commit acts of hostility in those waters at all times as against all states willing to do likewise. The treaty, therefore, instead of emphasizing a warning to such powers as might be indifferent to the scheme of neutralization, was an invitation to the civilized world to share the benefits of the interoceanic high-

way by making a common sacrifice. Thus the United States and Great Britain made an offer, the terms of which are not uncertain. Whether or not these nations shall be bound by the obligations which they are ready to impose upon themselves, depends upon the acts of other states. If the offer is accepted, the high contracting parties will be bound, and the Hay-Pauncefote treaty will embody the mutual rights and obligations not merely of Great Britain and the United States, but of the Anglo-Saxon race and the powers of the world. It will be our duty not to oppose the passage through the Isthmus of the war vessels of a belligerent consenting to the rules and at war with the United States. While the treaty does not contain the statement that the canal shall be open in time of war as in time of peace, provision is nevertheless made for the transit of ships of a belligerent. Furthermore the right of transit is given to vessels of war "of all nations on terms of entire equality." Any nation, therefore, observing the rules and consenting to the plan of neutralization would be entitled to share the benefits as well as the burdens attaching to the right of transit. Should Germany acquiesce in the plan proposed and subsequently make war against the United States, neither nation would have the right to commit hostile acts in or near the canal. Our obligation to refrain from attempting to prevent the transit of the Kaiser's warships would be identical with our obligation toward the vessels of King Edward's navy in the event of a similar catastrophe.

The question arises as to what would constitute an acceptance of the offer thus extended by the United States and Great Britain? A treaty negotiated between England and some other power in which the latter acceded to the plan of neutralization would be an acceptance of the Anglo-American offer. A declaration by a friendly state, in response to an inquiry from the British Foreign Office or elicited by a note from the Department of State, and indicating a candid desire to acquiesce in the terms of the Hay-Pauncefote treaty would signify unqualified acceptance. The transit of vessels of war of another nation might be taken to indicate its approval of the rules and of its consent to observe them. Such enjoyment of the benefits conferred by the terms of the treaty and not secured by the law of nations would imply an acknowledgment of the obligation to observe the duties imposed by that convention. The passage through the canal, however, of the vessels of commerce of a friendly state would not mean as much. The law of nations gives to every maritime power the right to send



its vessels of commerce through such a canal. "If the navigation of the two seas thus connected is free," says a learned writer, "the navigation of the channel by which they are connected ought also to be free."<sup>1</sup> It is not the purpose of the writer to attempt to specify all the methods which might be employed by the several nations to accept the offer contained in the treaty. It is submitted, however, that the terms proposed by our government and Great Britain may be taken advantage of by other states without negotiating treaties with the United States for that purpose. The nature of our contract with England is such that by that agreement both countries hold out to all other maritime states, interested in the isthmian project, the opportunity to become sharers in the scheme of neutralization by means of any candid manifestation of coöperation. If the other powers as well as the United States and Great Britain should adhere to the plan proposed, the status of neutralization would be securely attached to the interoceanic canal. Its condition would be like that of the Suez Canal, which is thus described by the late Senator Davis in a report as Chairman of the Senate Committee on Foreign Relations: "None of the European powers would have it otherwise, because it is to the interest of all nations that war shall not exist in or near the canal, and it is a national crime for any nation to violate the neutral ground. No nation is willing to incur universal hostility by violating the sanctity of waters in which all have equal rights."<sup>2</sup>

In conclusion it may be said that the United States by ratifying the Hay-Pauncefote treaty has placed itself under an obligation not to commit hostile acts against Great Britain in or near the canal; that our government offers to place itself under a like obligation to all other states consenting to the plan of neutralization; and that finally, it has imposed upon itself no restraint to commit such acts in that locality against states not acceding to that plan.

To summarize briefly the scope of the new treaty is to say that it provides for the substantial fulfilment of the objects expressed in the preamble. The Clayton-Bulwer treaty is superseded; our government secures the right to construct the canal and to protect it from injury; and a simple plan of neutralization

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<sup>1</sup> Wheaton's *Elements of International Law*, edited by R. H. Dana, Jr., 8th ed., § 181. See also Woolsey's *Introduction to the Study of International Law*, 4th ed., § 57.

<sup>2</sup> VIII. Reports of the Committee on Foreign Relations, United States Senate, 1789-1901, p. 668.

is agreed upon which is free from inconsistent provisions and capable of being made effective by the conduct and acquiescence of other nations coöperating with the sincere and friendly efforts of the United States and Great Britain.

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**EXECUTORY CONTRACTS FOR THE SALE OF LAND AS AFFECTED BY EMINENT DOMAIN.** — An executory contract was entered into for the sale of land, the seller giving a bond to convey a title free from incumbrances. Before the time for conveyance, a fourth part of the land was taken by right of eminent domain. The purchaser claimed the right of rescission, and sought to recover that portion of the purchase money which he had paid. Recovery was allowed on the ground that there was a sufficient failure of consideration to justify a rescission of the contract. *Kares v. Covell*, 62 N. E. Rep. 244 (Mass.). Although the case is dismissed quite summarily, it presents in a new way a much controverted question: must not the purchaser, as incident to his equitable right to specific performance, bear the loss of an injury to the premises which occurs, without the fault of either party, between the making of the agreement and the time for transferring the legal title? This subject has usually been considered in cases where the injury was occasioned by fire. But the same principles are applicable when the land is taken by eminent domain. In neither case is there any fault on the part of the vendor.

There are three possible views as to the risk of loss in an executory bilateral contract for the sale of land. It may be said, as in the principal case, that the loss is upon the vendor, because if he is unable to convey what he has promised, there is a failure of consideration, and he cannot exact payment from the purchaser. This view, necessitated by a strict

adherence to the doctrine of implied conditions in the law of contracts, prevails in Massachusetts and several other states. *Wells v. Calnan*, 107 Mass. 514; *Thompson v. Gould*, 20 Pick. (Mass.) 134; *Wilson v. Clark*, 60 N. H. 352. The purchaser, however, may assume the risk if such is the intention of the parties. And one writer, finding an indication of such intention in the fact of a transfer of possession to the purchaser, has ably argued that the loss should fall upon the party in possession of the premises at the time of the accident. See 9 HARV. L. REV. 106. The third view, as a result of the equitable doctrine of specific performance, puts the risk upon the purchaser from the moment that the contract is made. *Paine v. Meller*, 6 Ves. 349. From that moment equity treats the seller in many respects as a mortgagee or trustee holding the legal title merely as security for the price. He cannot convey a good title to any one having notice of the contract; his creditors cannot reach the land; it will pass under a devise of his trust estate; and he must use husbandlike care in its management. The buyer on the other hand is like a *cestui que trust* or mortgagor. His interest passes as real estate to his heirs or devisee; it is subject to his widow's dower; by recording the contract he can prevent his interest from being divested by any sale; he is chargeable with the costs of compulsory improvements; and any increase in the value of the premises accrues to his benefit. See 1 COL. L. REV. 1. In only one respect, apparently, does the analogy break down; the vendor does not have to account for the rents and profits. This is so because it is only just to allow him the use of the land until he is entitled to the use of the purchase money. From the making of the contract, therefore, the purchaser becomes practically the *dominus*. Equity has given him at once, as incident to the right of specific performance, substantially everything he bargained for. Justly, then, it would seem, it puts upon him the risk of accidental loss. This is the view generally accepted. *Paine v. Meller*, *supra*; *Brewer v. Herbert*, 30 Md. 301; see *Imperial, etc., Co. v. Dunham*, 117 Pa. St. 460, 477.

The acceptance of this view necessitates a decision opposed to that of the principal case. Such a result was reached in the only similar cases which have been found. *Stevenson v. Loehr*, 57 Ill. 509; *Kuhn v. Freeman*, 15 Kan. 423. It has even been held that though all the land be taken the purchaser must still pay. *Gammon v. Blaisdell*, 45 Kan. 221. But, as the equitable owner, he is entitled to whatever compensation is made. LEWIS, EM. DOM., § 319.

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THE RESTRAINT OF LIBEL BY INJUNCTION. — For one hundred and fifty years there has existed a tradition having the force of absolute law that equity has no jurisdiction to enjoin a libel. The cases declaring such to be the law all refer to two decisions, *Huggonson's Case*, 2 Atk. 469 (1742), and *Gee v. Pritchard*, 2 Swanst. 402 (1818).

In the former a bill was filed to commit two defendants for having published a libel. Lord Hardwicke very properly adopted the ground that he could not punish them for libel, as the only relief was at law. It is to be noticed that the bill asked chancery to punish a past tort, not to restrain a future one. And the decision would have been the same had the offence been assault or trespass. The case of *Gee v. Pritchard*, *supra*, contains a *dictum* by Lord Eldon that equity will not restrain the pub-

lication of a libel, since such publication would be criminal, and equity cannot enjoin the commission of a crime. Furthermore in both cases the plaintiff succeeded on other grounds. It is also a significant fact that *Huggonson's Case* was decided sixty years before the courts of chancery under Lord Eldon's guidance gradually made use of their power to enjoin threatened trespasses.

Except for a *dictum* of Lord Ellenborough in *Du Bost v. Beresford*, 2 Camp. 511, the question seems to have lain dormant in England from this time until 1869, when Vice-Chancellor Malins granted a series of injunctions against libels. He based his decisions on the grounds that a man's right to carry on business is a property right, that the threatened publications would do irreparable mischief, and that the assessing of damages at common law would be inadequate and unsatisfactory relief. His authority was directly overruled, however, in 1875, by Lord Cairns in *Prudential Assurance Co. v. Knotts*, L. R. 10 Ch. App. 142. Since this time the English cases have been based on the Procedure and Judicature Acts of 1854 and 1873.

In the United States the law is in a confusing condition. Equity will not restrain a "mere" libel without some additional circumstances. *Boston Diatite Co. v. Florence, etc., Co.*, 114 Mass. 69; *Lewin v. Welsbach Light Co.*, 81 Fed. Rep. 904. But it is hard to state with definiteness what circumstances are sufficient to alter the decision. Where injunctions have been granted restraining boycotting and similar conduct by labor unions the argument appears to have been that irreparable damage would be done by libellous and intimidating acts. See *Vege-lahn v. Guntner*, 167 Mass. 92; *Beck v. Teamsters', etc., Union*, 118 Mich. 497. In patent cases the granting of injunctions has depended either on the *mala fides* of the defendant, or on the fact that threats were contained in the publications. *Davison v. National Harrow Co.*, 103 Fed. Rep. 360; *Shoemaker v. South, etc., Co.*, 135 Ind. 471. Of course in all cases the plaintiff must show the probability of irreparable damage to his property or business. In New York, in spite of one decision to the contrary in an inferior court, the law seems to have been settled that equity has no jurisdiction in libel cases. *Brandreth v. Lance*, 8 Paige (N. Y.) 24; but see *Croft v. Richardson*, 59 How. Pr. (N. Y.) 356. The injunction granted by the appellate division of the Supreme Court in a recent case is therefore the more remarkable. *Marlin, etc., Co. v. Shields*, 68 N. Y. App. Div. 88. The defendant, a magazine editor, in order to force the plaintiff to advertise in his paper, wrote and published fictitious letters derogatory of the plaintiff's goods. The court in overruling a demurrer to the bill says, "It is therefore clear that . . . equity may . . . restrain the publication by injunction even though such publication embodies a libel upon the person; and all that seems necessary . . . is that the intended publication will work the destruction of property or inflict irreparable injury thereto." This is sound common sense. In theory there seems to be no reason why libels like other torts should not be restrained, provided other facts necessary to give equity jurisdiction are present. The great objection is that the powers of free speech are curtailed; but it is submitted the advantages of equitable jurisdiction in these cases far outweigh this disadvantage.

COMMON LAW LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLIGENCE. — Fundamental in the law governing the liability of a municipal corporation to civil actions by individual citizens is the recognition of the double character which such a corporation assumes. In one aspect, it stands as the representative of the sovereign, charged with certain governmental, legislative and judicial, or discretionary, powers and duties; in the other, it is regarded as being similar to a private corporation, with duties purely ministerial, corporate, or private, with powers granted for the special emolument or benefit of the municipality. *Bailey v. Mayor, etc., of New York*, 3 Hill (N. Y.) 531, 539. The rule is settled that in the former capacity the corporation is liable in civil suits for damages resulting from the negligence of its agents only where a statute imposes such liability. In the latter capacity, it is ordinarily liable impliedly or at common law, as would be a private person. See 2 THOMP., NEG., 1st ed., 731. The reason given for the exemption in the first class is that the corporation as an agent of the sovereign should possess the immunity of the sovereign from liability unless it consents to submit to that liability. *O'Connor v. Pittsburgh*, 18 Pa. St. 187. The main difficulty arises in determining within which class of duties a given act falls, and upon this point the authorities have not taken altogether consistent positions.

In a late Maryland case a municipal corporation acting within its charter powers had passed an ordinance prohibiting fast bicycle riding on the streets. Through negligent failure to enforce the ordinance it became a dead letter, the nuisance continued, and the plaintiff was injured in consequence. The court held the city liable on the ground that its duty had not been discharged by the mere passing of the ordinance, but that it must use due care in the enforcement thereof. *Mayor, etc., of Hagerstown v. Klotz*, 49 Atl. Rep. 836. This decision is contrary to the great mass of authority, which holds that the passing and enforcing of ordinances are among the governmental or discretionary powers of a municipal corporation; and that for the failure to pass ordinances, or for the negligence of its police officers in enforcing them after they are passed, the city shall not be liable. *Jones v. Williamsburgh*, 97 Va. 722.

On the other hand, in a similar class of cases, viz., those respecting the duty of repairing defects in highways, the weight of American authority outside of the New England states classifies the duty as a corporate duty, and consequently makes the municipal corporation proper — as distinct from counties, townships, etc. — liable for injuries resulting from negligent failure to repair. See DILL, MUN. CORP., 4th ed., § 1017. The English rule is contrary to this. *Gibson v. Mayor of Preston*, L. R. 5 Q. B. 218, 221. One court in speaking of the two classes of cases says: "The condition of the street or walk . . . is one thing and the manner of its use by the public is quite a different thing." *Jones v. Williamsburgh, supra*. But it is difficult to see why the repairing of a street used by the public is not as much a public duty as the enforcement of an ordinance regulating the use of the same street; or why the removal of an inanimate obstruction in the highway should be a corporate duty, while the removal of a bicycle "scorcher" should be a governmental duty.

If we regard the fundamental principle of the twofold nature of municipal corporations as sound, the repairing of highways would be, as a matter of reason, very near the dividing line between the corporate and the governmental duties, if not actually among the latter. If the implied



liability is to exist in this class of cases, — a result which would seem to be desirable, — such liability must be regarded as an exception to the rule and justified on grounds of policy. It seems impossible, however, to doubt that the enforcement of ordinances falls on the side of governmental functions, and for negligence in this respect there should be no liability at common law.

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**DEFENCES OF ESTOPPEL AND CONTRIBUTORY NEGLIGENCE AGAINST SOVEREIGNS.** — A legal question upon which a dearth of direct authority exists is suggested by two recent cases. One was an action to enjoin the collection of taxes assessed upon the plaintiff's land. In answer to the defence that no taxes had been paid the plaintiff relied upon an alleged estoppel, but the court held that an estoppel *in pais* could not be raised against the city acting in its governmental capacity. *Philadelphia Mortgage, etc., Co. v. Omaha*, 88 N. W. Rep. 523 (Neb.). In the other case a suit was brought by a township trustee for negligently setting fire to a roadway. The court in a *dictum* said that as the township was only a political subdivision of the state it was not subject to the defence of contributory negligence. *Pittsburg, etc., R. R. v. Iddings*, 62 N. E. Rep. 112 (Ind., App. Ct.).

The doctrine that the defences of contributory negligence and estoppel cannot be set up against a sovereign seems impossible to support upon any legal principle. It is of course universally conceded that no court of its own right may presume to judge between sovereign and subject. It seems clear, however, that the voluntary appearance of a sovereign before a tribunal of justice is a signification of its desire that the issue in question be decided according to the rules of justice administered by that tribunal. The defences of contributory negligence and estoppel are as deeply rooted in the courts' conception of justice as the defences of payment to an action on a bond or waiver to an action on a contract. To say that these defences cannot be set up in an action by or against a sovereign where jurisdiction has once been obtained, is to maintain either that standards of justice vary with the identity of the litigants, or that the state in consenting to the adjudication of the court impliedly stipulates that certain established principles of that tribunal shall not be applied to its disadvantage. Neither position is tenable.

In the negligence case the rule that the state is not liable for the negligent acts of its agents was relied upon to support the conclusion that their contributory negligence could not be set up in an action by the state. Such a conclusion, however, is founded upon a misconception of the basis of the non-liability of the state for the negligence of its agents. That immunity does not rest upon the ground that the acts of the agents are not the acts of the state, but is based upon the principle that the state is not amenable to the courts for its acts. There are certain legal analogies that seem to be in point and tend to a conclusion different from that reached by the courts in the cases under discussion. The ordinary rules of practice are not dispensed with by the fact that one of the parties to the action is a sovereign. *King of Spain v. Hullet*, 1 Cl. & Fin. 333. And in a suit for ejectment by a sovereign the defence of a waiver of conditions may be set up if the acts of the sovereign's agents would ordinarily constitute a waiver. *Davenport v. The Queen*, 3 App. Cas. 115. In this

country it has been held that a suit instituted by a state in its own courts but involving a federal question may be removed by the defendant to a federal court, and the general rule was laid down that the state comes into court as any other plaintiff so far as its opponent's right to defend is concerned. *Abeel v. Culberson*, 56 Fed. Rep. 329. Finally, although there is some authority to the contrary, the prevailing view is that an estoppel by deed may be set up against the state. *BIG., EST.*, 5th ed., 340.

Upon principle and analogy, therefore, the correct view would seem to be that the law should be applied in the same way in a suit to which a sovereign is a party as in an action between individuals, provided no express prerogative of the sovereign is thereby infringed. See 15 HARV. L. REV. 59.

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DEMURRER TO EVIDENCE IN CRIMINAL CASES. — The demurrer to evidence, deep-rooted as it was in the common law, has generally been superseded by the motion to enter a nonsuit, to direct the verdict, or to exclude the evidence from the jury. For these motions before the court are a less technical procedure than the demurrer to evidence and accomplish the same result of transferring from the jury to the judge the application of the law to the facts. Nevertheless the practice of demurring, although unusual, is still recognized in nearly half the states as a proper form of procedure in civil suits. See *Hopkins v. Nashville, etc., Ry. Co.*, 96 Tenn. 409. In criminal cases, however, not only are the instances of the use of a demurrer much less numerous, but there is considerable dispute as to the propriety of this form of procedure at all. West Virginia has recently ranged itself with those jurisdictions which deny the propriety of the demurrer to evidence in criminal cases, although it is allowed there in civil suits. *State v. Alderton*, 40 S. E. Rep. 350.

It is objected that if the accused has the right to demur to the evidence the state would have the same right without the consent of the accused, and thus the constitutional safeguard of trial by jury would be taken away. A short answer to this objection would seem to be that in criminal prosecutions a joinder in demurrer is optional, not compulsory as it is in civil suits. See *Baker's Case*, Cro. Eliz. 752; *Duncan v. State*, 29 Fla. 439. The second argument urged against the propriety of the demurrer is that it deprives the accused of the right to be proved guilty beyond every reasonable doubt, because, it is said, "all doubt must be resolved against the demurrant." The objection seems to rest upon the erroneous assumption that inferences from the evidence must be taken as strongly against the demurrant in criminal as in civil suits. The effect of a demurrer to evidence, it is submitted, is that the defendant contends that upon the evidence presented, the court acting as a jury would not be justified in finding an adverse verdict. See *Trout v. Virginia, etc., R. R. Co.*, 23 Gratt. (Va.) 619, 639. The court, therefore, no more than a jury, ought to deprive the accused of reasonable doubts in his favor. But even if it be granted that the accused does by his demurrer lose the benefit of having doubtful inferences taken in his favor, why should he not be allowed to waive this right? This view is held in *Martin v. State*, 62 Ala. 240.

On principle, therefore, there seems to be no valid objection to demurrers to evidence in criminal prosecutions provided jury trial may



be waived by consent. The weight of authority too, slightly inclines to this view in the few jurisdictions where the subject has come up. *State v. Groves*, 119 N. C. 822 ; 6 ENC. PL. & PR. 456. Nevertheless, even the courts which allow the demurrer look with disapproval on this "unusual and antiquated practice." Indeed there is nothing to recommend it in preference to the less technical motion before the court. And there are, on the other hand, several disadvantages in its use ; for the demurrant waives the benefit of any exceptions taken to prior rulings of the court, and is debarred from introducing more evidence if his demurrer is overruled.

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**FALSE WARRANTIES BY AN INFANT IN A POLICY OF INSURANCE.** — The confusion which may result from the undiscerning use of a term to which radically different meanings are attached in different branches of the law, is forcibly illustrated in a recent Rhode Island decision. An infant in his application for insurance to the defendant life insurance company made a false statement which was incorporated as a warranty in the policy subsequently issued. In a suit by the beneficiary to collect the policy the company contended that the falsity of the warranty rendered the contract void. It was held, however, that the breach of such a warranty by an infant constituted no defence since by allowing it, the court would in effect be making the infant's contract binding upon him. *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 50 Atl. Rep. 834. The court arrives at this conclusion through a consideration of various classes of cases, such as false warranties in the sale of chattels, and promissory notes given in payment for things not necessities : cases in which the infant is free to avoid his contracts. Particular reliance was placed on a decision which refused to allow a defendant employer in a suit by a minor for wages, to set-off the damages caused by the minor's breach of promise to give notice before quitting. *Derocher v. Continental Mills*, 58 Me. 217. No case precisely in point was cited in the opinion, nor has any been discovered in the reports.

In all of the cases relied upon by the court, it will be seen that the infant had made some promise, and in accordance with the old common law rule was allowed to avoid it. A warranty, however, does not in all branches of the law include a promise. In a deed, a warranty comprises a representation as to an existing fact as well as a promise. *Bush v. Cooper's Adm.*, 18 How. 82. In a charter party, a warranty is a promise which operates as a condition precedent ; its breach gives the other party a right to refuse to go on with the contract, or waiving it as a condition, he may sue upon it as a promise. *Behn v. Burness*, 3 B. & S. 751. A warranty in sales of personal property is strictly not a condition upon which the contract is based, but a collateral undertaking — a promise, as is shown by the fact that a consideration is necessary to support it. BIDDLE, WAR. IN SALE OF CHATS., § 4. In a contract of insurance, on the other hand, warranty is used as synonymous with condition, and is construed as a "condition precedent, which must be complied with to the minutest detail, or else the contract is rendered void." BLISS, LIFE INS., § 34. A policy of insurance being a unilateral contract, the only promises it contains are the promises of the insurer. The warranties constitute the basis or condition upon which the insurer assumes the liability.

Had the court in the principal case recognized the established construction of warranties in policies of insurance as being essentially conditions precedent, and not promises, it must logically have allowed a breach of warranty as a valid defence. Unfortunately, attempting to avoid the imaginary evil of making an infant's contracts binding upon him, the court fell into the real evil of forcing upon the insurer a contract that in fact he did not make.

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THE EFFECT OF MERGER UPON MORTGAGE DEBTS. — When the equity of redemption of mortgaged property unites in one person with the legal title, it is said that, unless a contrary intention express or implied is shown, the interests merge, and the mortgage debt is thereby extinguished. 2 WASH., REAL PROP., 4th ed., 196. Without discussing what state of facts are essential to the creation or prevention of merger, the question naturally arises, is extinction of the debt a necessary consequence? A recent Illinois case answers this question positively in the affirmative. The purchaser of an estate subject to a mortgage bought in the note and the mortgage securing it. He then sued upon the note, but was not allowed to recover, on the ground that there had been a merger of interests and that consequently the debt had been extinguished. *Hester v. Frary*, 17 Chic. L. J. 45. Although this decision is in accord with the general law, there has been but little discussion of the point. It is common knowledge that the holder of a note secured by a mortgage has two distinct rights, one against the land and the other against the mortgagor; and it is even held that the first may exist when the latter has been barred. *Hanna v. Wilson*, 3 Gratt. (Va.) 243. Why, then, may not the personal liability exist without the mortgage security? It is conceived that the solution may be found in the laws of subrogation. When one who is collaterally bound as surety or indorser to pay a mortgage debt pays it, he is subrogated to the rights of the payee. SHELTON, SUBROG., § 3. In the principal case, for example, if there had been no merger of the equitable and legal interests in the security, the defendant on paying the note would have been entitled to hold the mortgage until redemption. The merger, however, is said to prevent the separation of the mortgage interest from the fee in which it has merged. Consequently, if the defendant were to pay the note, he would be left without the security ordinarily incidental to the payment of a mortgage note. To prevent such a result, the debt is said to be extinguished. It is suggested, however, that the debt is not extinguished, but that, the right of foreclosure against the land being gone, the personal liability only up to the value of the premises is wiped out. Without straining the doctrine of merger, this would protect the mortgage creditor in those cases where he chiefly needs protection, *i. e.*, where the value of the premises is less than the amount of the debt. If there has been a merger accompanied by extinguishment of the debt it results that the mortgagee, having prudently supplied two strings to his bow, is forced to rely on one, and that the broken one. See *Dickason v. Williams*, 129 Mass. 182. Inasmuch as the defence of merger is in history and nature equitable, it seems that in justice it should be limited in effect to the value of the premises. Had there been foreclosure the debtor would have been personally liable for the amount not covered by the proceeds

of the sale. As in theory merger affects merely the right to foreclose, and not the debt, the liability for that part of the debt not covered by the land should still remain.

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#### INADEQUACY OF CONSIDERATION AS A BAR TO SPECIFIC PERFORMANCE.

— The rule that equity follows the law receives an additional exemplification in the general refusal by the courts of equity to allow mere inadequacy of consideration to be set up as a defence to a bill for the specific performance of a contract. As the common law courts will not examine into the adequacy of consideration, so equity will not refuse to enforce a contract because the consideration is inadequate, provided the parties when entering into the agreement stood on an even footing, and the element of fraud was absent. *Coles v. Trecothick*, 9 Ves. 234, 246; *Seymour v. Delancy*, 3 Cow. (N. Y.) 445. An exception to this general rule is found in contracts for the sale of reversionary interests by heirs. *Playford v. Playford*, 4 Hare 546.

A recent case in the United States Circuit Court, however, deals with this question and reaches a somewhat different conclusion. The defendant in consideration of the sum of one dollar to him paid agreed to lease land to the plaintiff for the purpose of drilling for oil and gas. If either were discovered the defendant was to have a certain portion of the product. The plaintiff made no absolute promises and was at liberty to cancel the contract at any time. On the defendant's putting a third party in possession of the premises the plaintiff brought a bill for specific performance, alleging that the leasehold interest was worth over two thousand dollars. One of the grounds for the court's refusal to decree specific performance was that the contract was unconscionable, that "the consideration would be so trifling compared with the value of the leasehold interest, as to shock the moral sense." *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep. 373. Had the court regarded such disparity between the value of the property and the price paid as almost overwhelming evidence either of fraud or of an intention to make a gift, the decision would have been in accord with generally accepted rules. But inasmuch as there was no intimation of fraud, and as the contract in its very essence was a speculation into which both parties entered with apparently full knowledge of its nature, the opinion of the court seems opposed to the current of authorities.

In favor of the opinion that equity should regard inadequacy of consideration as a ground for refusing specific performance, it may be said that the jurisdiction is purely discretionary and lies in the sound judgment of the court; that the parties cannot demand it as of right. *Gasque v. Small*, 2 Strob. Eq. (S. C.) 72, 77. Again it might be said that as common law courts regard a promise under seal as binding from the mere fact of the solemnity attending the making of such promise, so the requirement of valuable consideration, however slight, in a parol contract, exists merely for the sake of the formality which it gives to the transaction and the safeguard it affords against the consequences of rash and thoughtless promises. *Blount v. Blount*, 2 Law Repos. (N. C.) 587. As in the former equity will go back of the seal and refuse specific performance where no actual consideration has been given, POM., CONT., § 57, so in the latter, it might be urged, equity should look to see whether

the consideration be merely formal. On the other hand, without denying that the jurisdiction in such cases is discretionary, still it is true that this discretion is not arbitrary. *Harrison v. Town*, 17 Mo. 237. An apparently conclusive argument against a rule allowing equity to refuse specific performance on the ground of mere inadequacy of consideration is found in the practical impossibility of the court's weighing the numerous motives which may have actuated the parties when making the agreement. *Griffith v. Spratley*, 1 Cox 383. The problem of deciding just what is or what is not adequate consideration is too complicated. Were the courts to attempt this the freedom of contract would be greatly and unjustifiably limited.

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HOW AN EQUITY RULE HAS FARED IN MORTGAGE LAW. — Courts must frequently decide between rival equitable claims upon the same property. In this necessity it is natural that they follow the rule of preferring the equity which first attached. An exception often incorporated into the rule is also natural: that an equity less meritorious than a later one must be postponed, the criterion of merit being simply openness and fairness of dealing. *Rice v. Rice*, 2 Drew. 73. This exception is apparently the only one generally recognized.

Two established propositions in American mortgage law, however, are to be accounted for only under some other, special exception. The first proposition is that the holder in due course of a mortgage-note has the benefit of the security, though the mortgagee still retains the title thereof, and though the mortgagor before the note was indorsed was entitled in equity to have the mortgage cancelled. *Carpenter v. Longan*, 16 Wall. 271. A strong argument for this doctrine is that the mortgagor's property is simply made to satisfy a note to which the mortgagor has lost his defence, and that giving the holder of the note this special remedy upon an undoubted right does not substantially prejudice the maker. The second proposition of the two is that where one, by assignment or indorsement, becomes *dominus* of a mortgage-debt free from equities of third persons, the equity he acquires against the mortgagee's security-interest is also free from any equity that has attached to that interest in the mortgagee's hands. *Himrod v. Gilman*, 147 Ill. 293. It is noteworthy that such a latent, preëxisting equity could be recognized at most only if the purchaser of the debt chose to foreclose; for he might collect in any other way and keep the proceeds, and the mortgagor, on paying the one legally entitled to collect, might assert his own paramount equity to have the security back. The rule of *Himrod v. Gilman* simplifies, and is not unfair. Considered as an exception to the usual rule of priority, it has a common principle with *Carpenter v. Longan*, *supra*. Among equitable claimants against a mortgagee's interest, one who has lost the right on which his equity as a matter of substance depended is disregarded in favor of those subsequent in time but superior in power.

A recent California decision on a mortgage transaction violates the rule even so modified. A contractor's claim for constructing a building was subject, by statute, to an equitable lien in favor of material-men. He assigned this contract claim to secure his note. The assignee then assigned the claim to a dummy to hold for him, and indorsed the note to a holder in due course who did not know, although his indorser did,

that certain material-men were unpaid. The money due the contractor the court applied on the note in preference to the material-men's charges. *Perry v. Parrott*, 67 Pac. Rep. 144. Here the dummy held the legal power over the contract claim. Since that claim was originally mortgaged subject to the material-men's incumbrance, their equity was superior to the payee's and necessarily antedated that asserted by the indorsee. No reason for distinguishing the subjective merits of the claimants suggests itself, and, the security aside, the principal claims were of equal substantial validity. The prior equity should have prevailed, and, on similar facts, such was the express decision in *Linville v. Savage*, 58 Mo. 248. Only two other cases have been found directly in point. *Mott v. Clark*, 9 Pa. St. 399; *Van Burkleo v. Southwestern Mfg. Co.*, 39 S. W. Rep. 1085 (Tex.). They support the principal decision, not considering the fundamental equity rule and apparently over-generalizing the exceptions to that rule as defined above.

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DEVOLUTION OF REAL PROPERTY OF A DISSOLVED CORPORATION. — An interesting question is presented by a recent decision of the Texas Supreme Court. A Louisiana corporation owned land in Texas. Though owing no debts it was dissolved by the voluntary act of the stockholders, three of whom were appointed commissioners to settle the corporate affairs. These three brought an action of trespass in Texas to try title to the land belonging to the corporation. It was held that though their appointment was not evidenced by such an instrument as was required for the conveyance of land in Texas, yet they could maintain the action in their character as stockholders, since on the dissolution of the corporation the title passed to the stockholders as tenants in common. *Baldwin v. Johnson*, 65 S. W. Rep. 171.

The common law rule has been generally stated to be that land of a dissolved corporation reverts to the grantor. 2 MOR., CORP., § 1031. A reference to the history of the law and to the only decided case on the point shows, however, that if the stockholders cannot claim, the property escheats, instead of reverting to the grantor. GRAY, PERP., §§ 44-51; *Johnson v. Norway*, Winch 37. Personal property, according to the generally stated common law rule, also goes to the sovereign as *bona vacantia*. *In re Higginson and Dean*, [1899] 1 Q. B. 325. These questions, however, have rarely arisen for decision, and no American case squarely in point has been found. Texas like many other states has a statute providing that if a person dies without heirs the property shall escheat to the state. Construing this statute, together with the statutes as to descent and those expressly providing for the appointment of receivers and trustees for dissolved Texas corporations, it seems clear that it was only meant to apply to natural persons. The solution of the question to whom the property of the dissolved corporation should go depends, therefore, upon common law principles. And this is true even though the statute applies to artificial persons; for if the stockholders can be held to succeed to the corporate property, the statute obviously has no application.

The American courts have been very alert in imposing a trust on the property of dissolved corporations for the benefit of creditors and shareholders. *Bacon v. Robertson*, 18 How. 480. Such a trust, while working



justice where a receiver holds the property, would be unenforceable against the state, even assuming that the state would not take free from equities in such cases. See 12 HARV. L. REV. 558. In the case of a foreign corporation like the present, however, where no one has been appointed who can hold the legal title, justice can only be meted out by giving the property to the stockholders.

Whatever the common law doctrine may be, it had its origin in days of municipal and ecclesiastical corporations, when modern business corporations with stockholders were unknown. The rule has often been called both obsolete and odious. ANG. & A., CORP., 779 a. Considering, therefore, that the doctrine has never been affirmed in America, that it is wholly inapplicable to modern conditions, and that it has been doubted by almost every American text-writer, it seems not going too far to adopt a more liberal and just rule in its place. In a note to *In re Higginson and Dean* it is said, "The dissolved corporation was merely a legal name for the members of whom it consisted. The debts due to the corporation were therefore in substance, though not in form, debts due to these members. On the corporation being dissolved these debts may be considered to be in reality and in conscience the property of the persons who then constituted the corporation. But this natural justice cannot be expressed in any known terms of law or equity." 15 L. QUART. REV. 115. In other words, if the property goes to the state a mere technicality is to stand in the way of the rights of the stockholders, and this technicality is to be strictly applied in a branch of the law, which is full of anomalies, and which is constantly being moulded to meet new conditions. Modern corporate existence would be impossible without stockholders; the capital is furnished by them, and the property should "in reality and in conscience" belong to them when the corporation is dissolved, subject of course to the rights of creditors.

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## RECENT CASES.

**BANKRUPTCY — AGREEMENT NOT TO PROSECUTE A DISPUTED CLAIM AS FRAUDULENT CONVEYANCE — TRUSTEE'S RIGHT TO THE CONSIDERATION.** — An insolvent, who was contesting his father's will, agreed not to oppose the probate of the will, in consideration of the devisee's promise to convey part of the property to a daughter of the insolvent. The latter was afterwards adjudged a bankrupt. *Held*, that the daughter will be ordered to convey the property received by her to the trustee in bankruptcy. *Smith v. Patton*, 62 N. E. Rep. 794 (Ill., Sup. Ct.).

The statute of 13 Eliz. c. 5, concerning fraudulent conveyances, is in general merely declaratory of the common law, and the enumeration in the statute is by no means complete. BUMP, FRAUD. CONVEY., § 12. The principle would seem to include any sacrifice of an asset by which a debtor intentionally hinders any of his creditors in obtaining relief against the debtor's estate, under the circumstances which make an ordinary conveyance fraudulent. *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290; see *Cadogan v. Kennett*, 2 Cowp. 432, 434. Moreover, where the consideration for the bankrupt's fraudulent act is the conveyance of property to a third person who is a volunteer, this property, since it is purchased by giving up a right in which the creditors had an interest, should be subject to a constructive trust for the creditors. *Whittlesey v. McMahon*, 10 Conn. 137; see *Coleman v. Cocke*, 6 Rand. (Va.) 618. In the principal case the bankrupt's agreement not to contest the will, being a defence to

any attachment of the testator's property as property belonging to the bankrupt, is within the principle above stated; and the elements necessary to constitute fraud appear to have been present. Therefore, under § 70 *e* of the Act of 1898, the trustee in bankruptcy seems entitled to recover.

**BANKRUPTCY — EXECUTION SALE BEFORE PETITION FILED — VALIDITY OF TITLE.** — § 67 *f* of the Bankruptcy Act of 1898 declares that all judgments obtained against an insolvent within four months prior to the filing of a petition in bankruptcy "shall be deemed null and void in case he is adjudged a bankrupt." *Held*, that a sale of realty on execution under a judgment obtained within the prescribed time will not be avoided at the suit of a prior fraudulent grantee of the same property, as the trustee in bankruptcy is the only person entitled to plead the nullity of the execution sale. *Hutchins v. Cantu*, 66 S. W. Rep. 138 (Tex., Civ. App.).

While the Bankruptcy Act gives the trustee a right to avoid the sale, the court regards the purchaser as having a perfect legal title until the trustee takes such action. On the same ground such a purchaser, without ever having been in possession of the land, has been allowed to maintain an action in ejectment. *Frasce v. Nelson*, 61 N. E. Rep. 40 (Mass.). In spite of the sweeping language of the act, these decisions seem sound, since no reason appears why the framers of the act should have intended any further operation. It does not follow that the purchaser at the execution sale possesses a "marketable title" sufficient, for example, to satisfy a decree for specific performance. Under the Act of 1867, § 14, all the previous judicial proceedings were annulled by the bankruptcy proceedings, unless the assignee waived his claim, and after a period of a dozen years or more, the assignee was allowed to take such property as assets of the estate. *In re Preston*, 6 N. B. R. 545; *Dushane v. Beall*, 161 U. S. 513. The right of the trustee under the present act to annul such an execution sale as that in the principal case, would seem to be equally extensive in time, and so long as it subsists, creates a serious cloud on the title; but the sale is valid as against any one but the trustee.

**BILLS AND NOTES — ASSIGNMENT BY DELIVERY — PAYMENT TO LEGAL OWNER NOT IN POSSESSION.** — The assignee of an unindorsed note surrendered it to the payee for purposes of renewal. The maker, knowing of this transaction, gave a renewal note to the order of the same payee, to whom he later paid the amount of the note in ignorance of the fact that it had been assigned by delivery to the former assignee and was then unindorsed in the latter's possession. *Held*, that the maker is still liable to the assignee. *Wagner v. Grimm*, 169 N. Y. 421.

As the court suggests, the mere fact that the payee received payment without producing the note might be considered sufficient to warn the defendant of possible rights in the possessor, so that the payment, though to the legal owner, would not discharge the defendant. This accords with the business view as to all classes of instruments in which rights are customarily given by delivery, that such delivery gives the assignee a security on which he can rely. See *Spencer v. Clarke*, 9 Ch. D. 137. This principle is properly applied to mortgage bonds. *Clinton Loan Assoc. v. Merritt*, 112 N. C. 243; *contra*, *Mutual Life Ins. Co. v. Hall*, 50 S. W. Rep. 254 (Ky.). It is generally ignored, unfortunately, in decisions as to bills and notes, and sometimes expressly disapproved. *Bury v. Hartman*, 4 S. & R. (Pa.) 175; but see *Bates v. Martin*, 3 Mo. 367. In the principal case, however, the court relied partly on the defendant's knowledge of the dealings with the old note as supplying constructive notice of the assignment of the new one. Doubtless if all parties intended the payee to take and keep the new note as trustee he could properly receive payment. *Boone v. Citizens' Savings Bank*, 84 N. Y. 83. In the absence of such an understanding, the defendant's knowledge of the previous dealings would go far to justify the decision, and, considered in connection with the principle first stated, seems conclusive. *Cf. Baldwin v. Billingsley*, 2 Vern. 539.

**BILLS AND NOTES — USURY — FORFEITURE.** — The plaintiff had paid to the defendant a usurious rate of interest and sued to recover the penalty provided for by § 5198 of the Revised Statutes of the United States. *Held*, that the plaintiff is entitled to recover twice the entire amount of interest paid. *First Nat. Bank v. Watt*, 22 Sup. Ct. Rep. 457.

Although the lower federal courts and many of the state courts have been called upon to determine whether the amount recoverable under this section is twice the entire amount of interest paid, or only twice the amount by which the usurious interest

exceeds what legally might have been collected, heretofore there has been no decision upon the point by the Supreme Court. The courts of two states have construed the statute as giving the smaller penalty only. *Hinterminster v. First Nat. Bank*, 62 N. Y. 212; *Bobo v. People's Nat. Bank*, 92 Tenn. 444. But such decisions place so severe a strain upon the language of the statute that it has been almost uniformly held that the larger penalty may be recovered. *Boemer v. Traders Nat. Bank*, 90 Texas 443; *Crocker v. First Nat. Bank*, 4 Dill. (U. S. Circ. Ct.) 358. This view is now conclusively established by the Supreme Court's decision in the principal case.

**CONFLICT OF LAWS — FOREIGN JUDGMENTS — PROBATE OF WILL —** A will created trusts of personal property good by the law of Connecticut but too remote by the law of New York. The will was probated in Connecticut as the will of a citizen of that state. Subsequently the testator's widow, to defeat the trusts, sought to establish the will in New York as that of a citizen of New York. *Held*, that the testator's domicil at the time of his death was in New York, and that the will should be established there. *Plant v. Harrison*, 36 N. Y. Misc. 649 (N. Y., Sup. Ct., Sp. Term).

Every state in which a deceased person leaves personal property has jurisdiction to determine how that property shall pass. STORY, CONFL. LAWS, §§ 513-518. It is, however, general law that personal property may be transferred by a will valid by the law of the testator's domicil, and that jurisdiction to declare the will of a testator belongs to the state in which he was domiciled at the time of his death. *Desesbats v. Berquier*, 1 Binn. (Pa.) 336; *Succession of Gaines*, 45 La. Ann. 1237. That jurisdiction is *in rem*, and seems analogous to the jurisdiction in divorce cases over the *status* of the parties. Cf. 15 HARV. L. REV. 66. A judicial proceeding based on an invalid assumption of jurisdiction is not one to which, by the federal constitution, "full faith and credit" must be given. *Board of Pub. Works v. Columbia Coll.*, 17 Wall. (U. S.) 521; *Bell v. Bell*, 181 U. S. 175. Consequently when a will is probated in a state erroneously claiming jurisdiction on the ground of domicil, the decree of probate, so far as it assumes to declare the will, need not afterwards be respected by the courts of other states. *Overby v. Gordon*, 177 U. S. 214. Nevertheless a grant of letters of administration on the property within the state is valid, though the title is determined according to the decree of probate in that state, and effect is thereby given to the probate as to that property; for the subject-matter is within the jurisdiction of the court, and where there has been no previous probate of the will in another jurisdiction there can be no constitutional objection. See *Overby v. Gordon*, *supra*.

**CONFLICT OF LAWS — FOREIGN JUDGMENT — SUBMISSION BY CONTRACT TO FOREIGN JURISDICTION.** — By a clause in a contract made in Belgium, the defendant, an English subject not resident in Belgium, agreed that all disputes should be submitted to the jurisdiction of the Belgian courts. A dispute having arisen, the plaintiff brought action in Belgium, and the summons was sent by registered post to the defendant's address in England. By Belgian law such service was sufficient to give jurisdiction. Action was brought in England on the judgment obtained in Belgium. *Held*, that the defendant is bound by the judgment. *Feyericks v. Hubbard*, 18 T. L. R. 381 (Eng., K. B.).

According to the rule of the common law, a foreign judgment, though valid by the law of the court where it was obtained, cannot be enforced in the courts of another state, if it was obtained without personal jurisdiction over the defendant. *Schibsby v. Westenholz*, L. R. 6 Q. B. 155. Under what circumstances a court has jurisdiction by that rule is not clearly defined. It has, however, been decided that jurisdiction will be held to have existed if, at the time of the commencement of the suit in the foreign jurisdiction, the defendant was a subject or resident of the country; if he had come into the court as a plaintiff; or if he voluntarily appeared. *Douglas v. Forrest*, 4 Bing. 686; see *Schibsby v. Westenholz*, *supra*. Furthermore, in cases where none of these circumstances existed, but where the defendant had purchased stock in a foreign corporation under laws requiring submission to the foreign jurisdiction, a judgment of that jurisdiction has been held valid on the ground that the defendant had impliedly contracted to submit. *Bank of Australasia v. Nias*, 16 Q. B. 717; *Copin v. Adamson*, 1 Ex. D. 17. It would seem that, *a fortiori*, the result should be the same where the contract to submit is express; but only a *dictum* has been found to that effect. See *Rousillon v. Rousillon*, 14 Ch. D. 351, 371. A defect in a foreign judgment for want of personal jurisdiction can be set up only as an affirmative defence, and the defendant's contract is a good equitable answer to an attempt to set up that defence.



**CONSTITUTIONAL LAW — CONFLICT OF LAWS — TORT ACTION FOR ACT DONE IN ANOTHER STATE.** — The plaintiff, an Indiana citizen, was a servant of the defendant railway company, whose road ran through Indiana and Illinois. He was injured in Illinois through the negligence of a fellow-servant, for which, on the record, the company would not be liable in Illinois. He sued in Indiana under an Employer's Liability Act, relying on § 4, which provides that in a suit under the act for injuries occurring in another state, it shall not be competent for a railroad company to plead or prove the decisions or statutes of that other state. *Held*, that § 4 is unconstitutional as taking away a vested right of defence and therefore involving a deprivation of property without due process of law. *Baltimore, etc., Ry. Co. v. Read*, 62 N. E. Rep. 488 (Ind., Sup. Ct.).

As the statute in question was passed before any right of defence vested, the reason given for the court's decision is unsatisfactory; but the case may be supported on another ground. The American rule that the right to bring an action of tort depends on the *lex loci delicti*, has often been applied to cases of negligence by fellow-servants. *Ala. G. S. Ry. Co. v. Carroll*, 97 Ala. 126; *Louisville, etc., R. R. Co. v. Whitlow's Adm'r*, 43 S. W. Rep. 711 (Ky.). The attempt to abrogate this rule by legislation raises a question under the Fourteenth Amendment, under which the courts are inclined to group cases of objectionable extraterritorial legislation by a state. See *Pennoyer v. Neff*, 95 U. S. 714, 733. To attach liability to acts done in another state and entirely lawful there, would seem to be an excess of legislative jurisdiction, and therefore to fall short of the requirement of due process of law. The English rule, it is true, appears to be that if the act is not innocent or justifiable where committed, although not a tort there, the English law will govern tort liability in England. *Machado v. Fontes*, [1897] 2 Q. B. 231. But this doctrine, whether or not it would lead to an opposite result in the principal case, is difficult to support, and the American rule seems to have a basis of necessity in the sound principle that laws can have no extraterritorial effect.

**CONTRACTS — PUBLIC POLICY — RELEASE OF MASTER FROM LIABILITY TO SERVANT'S NEXT OF KIN FOR NEGLIGENCE.** — The next of kin of a railroad employee released to the company all right to damages which might accrue to him by the death of the employee through the company's negligence. *Held*, that the contract of release is void as against public policy. *Tarbell v. Rutland R. R. Co.*, 51 Atl. Rep. 6 (Vt.).

Where the contract is between the employee and the company, it has generally been held void in this country. *Lake Shore, etc., Ry. Co. v. Spangles*, 44 Oh. St. 471. The courts have gone on the ground that the employee, being at a disadvantage in contracting, should be protected, and that such contracts would tend to increase negligence on the part of the company. See note, 58 Am. Rep. 836. In two jurisdictions, however, these contracts have been enforced, in the absence of criminal or gross negligence, in order to allow the greatest possible freedom of contract in the disposal of services. *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357; *Western & A. R. R. Co. v. Bishop*, 50 Ga. 465. Where the release is given by the next of kin of the employee the same arguments for holding it void seem applicable. Consequently, though the case is new, it will probably be generally followed.

**COPYRIGHTS — ARTICLE IN ENCYCLOPÆDIA — WHO IS ENTITLED TO THE COPYRIGHT.** — The defendants employed the plaintiff to act as editor of an encyclopædia, and also to contribute articles. The copyrights to these articles were registered in the plaintiff's name. The defendants afterwards published the articles in separate form. *Held*, that the plaintiff is entitled to an injunction and damages. *Aflalo v. Lawrence & Bullen*, [1902] 1 Ch. 264.

In both England and America, where one employs another to do literary work, the author is entitled to the copyright, unless the employment is on the terms, either express or implied, that the copyright shall belong to the employer. See *Hereford v. Griffin*, 16 Sim. 190; *Heine v. Appleton*, 4 Blatch. (U. S. Circ. Ct.) 125. In some cases the agreement may be inferred merely from the nature of the work and the kind of employment. *Lamb v. Evans*, [1893] 1 Ch. 218. It would seem that, in the absence of circumstances negating such an agreement, it might be implied in the ordinary case of a magazine article, and perhaps an article in an encyclopædia, at least where the article is written by some one regularly employed to write for such periodical or encyclopædia; but there is apparently no American authority directly in point, and very little in England. See *Sweet v. Benning*, 16 C. B. 458. Each case, however, must stand on its own circumstances, and no hard and fast line can be drawn. If the principal case is sound the author can republish in separate form unless, in-

deed, as has been suggested by one text-writer, there is some principle by which he could be restrained for a reasonable time from nullifying his license to the publishers. See *DRONE, COP.*, 259, 260.

**CORPORATIONS — DISSOLUTION OF CORPORATION — SUCCESSION OF STOCKHOLDERS TO CORPORATE PROPERTY.** — Upon the dissolution of a Louisiana corporation owning land in Texas, certain stockholders brought in the latter state an action of trespass to try title to the land there situated. *Held*, that the action is maintainable, since on the dissolution of the corporation the property passed to the stockholders as tenants in common. *Baldwin v. Johnson*, 65 S. W. Rep. 171 (Tex., Sup. Ct.). See NOTES, p. 743.

**CRIMINAL LAW — PROCEDURE — DEMURRER TO EVIDENCE.** — *Held*, that a demurrer to evidence is not a proper method of procedure in a criminal prosecution. *State v. Alderton*, 40 S. E. Rep. 350 (W. Va.). See NOTES, p. 738.

**EQUITY — CONFLICTING EQUITIES — STATUTORY LIEN POSTPONED TO CLAIM OF HOLDER OF SECURED NOTE.** — The maker of a note assigned to the payee as security a claim for payment under a building contract. The payee assigned the claim to X to hold for him and indorsed the note to a holder in due course. The payee of the note knew, but the indorsee did not, that the contractor's claim was subject to a statutory lien for the benefit of material-men. *Held*, that the proceeds of the contractor's claim should be used to pay the indorsee of the note in preference to the material-men. *Perry v. Parrott*, 67 Pac. Rep. 144 (Cal., Sup. Ct.). See NOTES, p. 742.

**EQUITY — EXECUTORY CONTRACT FOR SALE OF LAND — PART TAKEN BY EMINENT DOMAIN — RECOVERY OF PURCHASE MONEY.** — The defendant contracted to convey land to the plaintiff. After part of the price had been paid, but before the delivery of the deed, a fourth of the land was taken by right of eminent domain. *Held*, that the plaintiff is entitled to rescind the contract and recover the purchase money which he had paid. *Kares v. Covell*, 62 N. E. Rep. 244 (Mass.). See NOTES, p. 733.

**EQUITY — INJUNCTION — COVENANT IN LEASE NOT TO ASSIGN.** — The defendant was the assignee of a lease for a long term of years with a covenant against assignment without the lessor's consent. The lease, which was very advantageous for the lessor, had still many years to run. *Held*, that equity will enjoin a threatened breach of the covenant. *McEachern v. Colton*, [1902] A. C. 104 (P. C.).

It is often said that courts look with disfavor upon covenants in leases. TAYLOR, LANDLORD & TENANT, § 685. Whether this attitude be correct or not as regards actions at law, equity, being free to deal with each case with reference to its peculiar circumstances, should apply the same general equitable principles to covenants in leases as to other contracts. So, when a covenantee has adequate legal remedy, or will suffer no damage, or the agreement is of a kind not ordinarily enforceable in equity, relief is denied. *Johnstone v. Hall*, 2 K. & J. 414; *Hill v. Barclay*, 16 Ves. 402. Injunctions, however, have been freely given in cases of covenants limiting the manner in which leased premises may be used; and this even where a right of re-entry was reserved but would afford inadequate relief. *Fleming v. Snook*, 5 Beav. 252; *Stees v. Krans*, 32 Minn. 313. Covenants against assignment are commonly accompanied by conditions for re-entry, which generally furnish adequate protection. This may explain why but two cases have been found, one denying, and one granting, the injunction. *Dyke v. Taylor*, 3 De G., F. & J. 467; *Cubitt v. Heyward*, 1 Seton 465. In the very similar case of a covenant not to sub-let, an American court granted an injunction. *Brolaskey v. Hood*, 6 Phila. (Pa.) 193. Altogether, the principal decision seems a satisfactory one, and will probably be followed.

**EQUITY — SPECIFIC PERFORMANCE — INADEQUACY OF CONSIDERATION AS A BAR.** — The defendant, in consideration of one dollar to him paid, agreed to lease land to the plaintiff for mining for oil and gas. The lease subsequently proved to be worth over two thousand dollars. *Held*, that mere inadequacy of consideration is a sufficient ground for refusing specific performance. *Federal Oil Co. v. Western Oil Co.*, 112 Fed. Rep. 373 (Circ. Ct., Ind.). See NOTES, p. 741.

**EQUITY—TRADE LIBEL—RESTRAINING PUBLICATION BY INJUNCTION.**—The defendant, editor of a magazine, published fictitious letters containing false statements derogatory to the plaintiff's goods. *Held*, that a bill for an injunction, stating the above facts, is not demurrable. *Marlin Fire Arms Co. v. Shields*, 68 N. Y. App. Div. 88. See NOTES, p. 734.

**INSURANCE—MUTUAL BENEFIT SOCIETIES—INSANITY AS EXCUSE FOR NON-COMPLIANCE WITH AMENDMENT TO BY-LAWS.**—The by-laws of a mutual benefit society provided that the benefits payable on the decease of a member should go to his mother under certain circumstances. An amendment to the by-laws struck out this provision and required the member to designate the person to take under the same circumstances, forfeiture being the penalty of non-compliance. A member who had become insane before the amendment was passed, failed to designate any one. Upon his death his mother, who would have taken under the former by-law, brought suit. *Held*, that the amendment and the non-compliance of the insane member afford no ground of defence. *Grossmayer v. District No. 1, etc.*, 22 N. Y. L. J. 2229 (N. Y., App. Div.).

The contract of insurance in mutual societies includes in its terms the charter and by-laws of the organization. See *Mitchell v. Lycoming, etc., Co.*, 51 Pa. St. 402. It is also generally held to include subsequent amendments to the by-laws, if reasonable. *Supreme Commandery, etc., v. Ainsworth*, 71 Ala. 436; *Allnutt v. Subsidiary High Court, etc.*, 62 Mich. 110. But it is argued that where, as in the principal case, an amendment is confessedly reasonable, it must apply to all members alike. This seems not to be a sound contention. Although compliance with reasonable amendments is in general obligatory upon all members, non-compliance should not be ground for forfeiture until opportunity has been given for compliance. Accordingly, forfeiture was not allowed where no notice of an amendment was received, nor where the acts required were, as to a particular member, impossible. *Thibert v. Supreme Lodge, etc.*, 78 Minn. 448; *Wist v. Grand Lodge, etc.*, 22 Or. 271. On the other hand, it would seem that where an amendment requires acts that could be done equally well by a guardian, non-compliance after notice to the guardian should not be excused. This is perhaps the proper ground on which to rest a decision holding insanity no excuse for non-payment of premiums, as in *Wheeler v. Connecticut, etc., Co.*, 82 N. Y. 543. In the principal case, as the act in question required an exercise of personal choice, a guardian could not well be substituted, and the court's solution seems the correct one. See also *Hoeffner v. Grand Lodge, etc.*, 41 Mo. App. 359; *Supreme Lodge, etc., v. Zuhlke*, 129 Ill. 298.

**INSURANCE—PERSONS—FALSE WARRANTIES BY AN INFANT.**—*Held*, that a breach of a warranty in an insurance policy does not avoid the policy when the insured is an infant. *O'Rourke v. John Hancock, etc., Ins. Co.*, 50 Atl. Rep. 834 (R. I.). See NOTES, p. 739.

**MORTGAGE—MERGER—EXTINCTION OF MORTGAGE DEBT.**—The plaintiff, having acquired an estate subject to a mortgage, bought in the note and the mortgage securing it. He then sued upon the note. *Held*, that the equity of redemption merged with the legal estate and that the debt was extinguished by the merger. *Hester v. Frary*, 17 Chic. L. J. 45 (Ill., App. Ct.). See NOTES, p. 740.

**MUNICIPAL CORPORATIONS—NEGLIGENCE IN ENFORCING ORDINANCE—COMMON LAW LIABILITY.**—A city, after passing an ordinance prohibiting fast bicycle riding on the streets, negligently failed to enforce it. The plaintiff was injured by one violating the ordinance. *Held*, that the city is liable for the injury sustained. *Mayor, etc., v. Klotz*, 49 Atl. Rep. 836 (Md.). See NOTES, p. 736.

**MUNICIPAL CORPORATIONS—TAXES—ESTOPPEL.**—The plaintiff sued to enjoin the collection of taxes upon his property. The taxes had not been paid, but before the plaintiff purchased the property he consulted the tax records of the city and found an entry of "paid" as to the taxes in question. *Held*, that the city is not estopped to show that the taxes were not paid. *Philadelphia Mortgage, etc., Co. v. Omaha*, 88 N. W. Rep. 523 (Neb.). See NOTES, p. 737.

**PERSONS—INFANTS' CONVEYANCES—TIME OF DISAFFIRMANCE.**—*Held*, that when an infant has made a conveyance of her realty, the right of disaffirmance which

arises on her coming of age may be exercised at any time within the period of the Statute of Limitations thereafter. *Shipp v. McKee*, 31 So. Rep. 197 (Miss.).

Express assent, or any deliberate act or forbearance by which the infant, after reaching full age, takes or retains a benefit from the transaction or knowingly suffers the other party to make expenditures on the land, is generally held to be an affirmation of the conveyance. *Irving v. Irving*, 9 Wall. (U. S.) 617; *McCormic v. Leggett*, 8 Jones L. (N. C.) 425. Where, however, there is no such conduct, but only a failure to exercise the privilege of avoidance, the weight of authority seems to incline toward the rule in the principal case. *Sims v. Everhardt*, 102 U. S. 300. It is submitted, however, that the aim of the law to protect the infant against his own imprudence is sufficiently attained by giving him a reasonable time to disaffirm after coming of age. A reasonable time may be longer in the case of conveyances than in that of contracts, but it would seem unnecessary to extend it to the full statutory period. Such an extension must result in great insecurity of title and frequent hardship to the other party, while affording a quite unnecessary amount of protection to the grantor. This view is supported by a strong line of authorities. *Goodnow v. Empire L. Co.*, 31 Minn. 463; *Hastings v. Dollarhide*, 24 Cal. 195. The legislative tendency is in the same direction. See STIMSON, AM. STAT. LAW, § 6602.

PROPERTY — COVENANT NOT TO ASSIGN A LEASE WITHOUT CONSENT OF LESSOR — REASSIGNMENT TO ORIGINAL LESSEE. — A lessee covenanted not to assign without the lessor's consent. The latter afterward consented to an assignment. *Held*, that a reassignment to the original lessee without consent is a suable breach of the covenant. *McEacharn v. Colton*, [1902] A. C. 104 (P. C.).

Where a lease contains a condition against assignment without consent, an alienation with consent determines the condition, so that no future alienation gives the lessor a right of entry. *Dumpr's Case*, 4 Co. 119 b. But a covenant to the same effect runs with the land, and the lessor can sue an assignee for breach of it. *Williams v. Earle*, L. R. 3 Q. B. 739; see *Paul v. Nurse*, 8 B. & C. 486, 487. Consequently the assignee would seem to be liable even for a reassignment to the original lessee without consent of the lessor. In the only case found on the point, however, the court considered that the lessor by making the lease consented to have the lessee as a tenant for the full term, and that such a covenant by its true construction did not require a new and special consent for a reassignment to the original lessee. *McCormick v. Stowell*, 138 Mass. 431. But properly construed, consent in such a case would seem to mean an act rather than a mere state of willingness, and can hardly be implied from a transaction happening before the idea of a reassignment would naturally occur to either party.

PROPERTY — DEEDS — RECORDING AS AMOUNTING TO DELIVERY. — *Held*, that the recording of a deed amounts *prima facie* to a delivery. *Lay v. Lay*, 66 S. W. Rep. 371 (Ky.).

This appears to be the first decision in Kentucky on the point in question. According to what seems the better view the act of delivery may be completed without the assent or knowledge of the grantee, the sole test of delivery being the grantor's intent to divest himself completely of title. See *Mitchell v. Ryan*, 3 Oh. St. 377; 14 HARV. L. REV. 456. Registry offices are intended for recording real transactions, so it might be regarded as sanctioning an abuse of the system to allow a man who has recorded a document, by which he purports to grant land, to say that he did not intend to give the instrument effect. Recording by the grantor, therefore, should be at least *prima facie* evidence of delivery, and might well be regarded as conclusive. In one state, however, there seems to be no rule making the mere act of recording even *prima facie* evidence. *Egan v. Horrigan*, 51 Atl. Rep. 247 (Me.). But the principal case is supported by the weight of modern authority. *Lawrence v. Farley*, 24 Hun (N. Y.) 293.

PROPERTY — GIFT CAUSA MORTIS — CONSTRUCTIVE DELIVERY. — A depositor, in expectation of death, delivered to her niece the key of a trunk containing a savings bank book, intending thereby to give the deposit to the niece. The trunk also contained other property, including several pass-books. The niece thus obtained possession of the book, though this was never known to the depositor. *Held*, that the delivery is not sufficient to establish a gift *causa mortis*. *Dunn v. Houghton*, 51 Atl. Rep. 71 (N. J., Ch.).

Delivery of a key is usually held sufficient to complete a gift of the entire property to which it gives access. *Marsh v. Fuller*, 18 N. H. 360. The majority of cases

make no distinction when only part of the property is given. *Devol v. Dye*, 123 Ind. 321. The principal case went largely on the ground that delivery of the key could not be considered a symbolical delivery of part of the property to the exclusion of the rest. It would seem, however, that such delivery is not properly termed symbolical. See *Coleman v. Porter*, 114 Mass. 30, 33. Its importance lies in the fact that by it the recipient acquires the power of control and therefore constructive possession; the key is the means of obtaining actual possession and not merely a symbol. See *Ward v. Turner*, 2 Ves. Sen. 431, 442; POLL. & WRIGHT, POSS., 61 *et seq.* In this respect such delivery is like attornment by a bailee, and both, inasmuch as they carry with them power to control, are forms of constructive delivery, not of the narrower delivery by symbol. See *Elmore v. Stone*, 1 Taunt. 458. Apparently, then, the better view would have supported the gift *causa mortis* in the principal case.

**PROPERTY—GIFT INTER VIVOS OF SAVINGS BANK ACCOUNT—RETENTION OF PASS-BOOK.**—A depositor withdrew her account from a savings bank, and reentered it payable to herself or niece. Both signed their names as depositors, the original depositor retaining possession of the pass-book. Her donative purpose was established. *Held*, that this transaction constituted a valid gift *inter vivos*. *Dunn v. Houghton*, 51 Atl. Rep. 71 (N. J., Ch.).

The courts hesitate to hold such joint deposits valid as gifts when the alleged donor retains possession of the pass-book. *Marshal v. Crutwell*, L. R. 20 Eq. 328. It is, indeed, held in some jurisdictions that the gift is never complete until all control is resigned by the donor. *Dougherty v. Moore*, 71 Md. 248. Such cases, however, seem to overlook the ground adopted in the principal case, that entering of the name of the donee as a joint depositor supplies the place of a delivery by creating a contractual relation between the bank and the new depositor, which the donor cannot directly extinguish. *Cf. Kerrigan v. Rautigan*, 43 Conn. 17. It is true that he has the power, so long as he retains possession of the pass-book, to do so indirectly by drawing out the entire deposit, but this can be done by any joint depositor. See *McElroy v. Albany Savings Bank*, 8 N. Y. App. Div. 46. The transaction is enough to give the survivor of the joint depositors absolute rights over the account to the exclusion of the personal representative of the deceased. *Mulcahey v. Emigrant Savings Bank*, 62 How. Pr. (N. Y.) 463. The better view, then, seems to be that mere retention of the pass-book will not defeat the gift. *McElroy v. Albany Savings Bank*, *supra*; *Estate of Griffiths*, 1 Lack. Leg. News 311.

**PROPERTY—SURFACE WATER—DISCHARGE IN A STREAM ON THE HIGHWAY.**—The defendant erected a retaining wall to support a building. To allow the escape of surface water, an opening was made in the wall, in which a six-inch pipe was inserted. Ice formed on the highway from water discharged through the opening; and the plaintiff, without negligence, slipped on the ice, sustaining personal injuries. *Held*, that this diversion of the surface water is not actionable. *Jessup v. Bamford, etc., Co.*, 51 Atl. Rep. 147 (N. J. C. A.).

The law of surface water is largely arbitrary, and not governed by satisfactory principles. See 14 HARV. L. REV. 390. In general, a proprietor may improve his land, regardless of the resulting obstruction or diversion of surface water. *Bowlsby v. Speer*, 31 N. J. Law 351. But this right does not extend to such changes as will cast the water upon adjoining land in an artificial stream. *Field v. West Orange*, 36 N. J. Eq. 118; *Bates v. Westborough*, 151 Mass. 174. The action in surface water cases is usually for damage to land; but the same rules should apply to the discharge of water upon a highway, and if through a violation of these rules the highway is made dangerous to travellers, an action should lie for personal injuries resulting. The principal case seems to be on debatable ground between the two rules above noted; hence the court was divided. The minority supported a literal enforcement of the restricting rule. The majority, however, recognizing both rules, seem inclined to apply the principle of reasonable user in a doubtful case. In another jurisdiction reasonableness has been made the test for all cases. See *Willitts v. Chicago, etc., Ry. Co.*, 88 Ia. 281. The application of such a doctrine to the law of surface waters would be desirable; but reasonable user involves a question of fact, and the court, if ready to adopt that test, should have left the question to a jury.

**SALES—DELIVERY—PASSING OF TITLE AS AGAINST THIRD PERSONS.**—A mortgagor, in part discharge of the mortgage debt, sent a flock of sheep to a place agreed upon for delivery. A large number of the sheep having become separated from the



flock on the journey, delivery was made of the remainder to the mortgagee's vendee, who paid the mortgagee for the number actually received. The mortgagee at once instituted search for the missing sheep. Before they were found by him, but after the delivery of the main flock, they were attached by a creditor of the mortgagor. There was no fraud imputed as to any part of the transaction. *Held*, that the mortgagee is entitled as against the creditor. *Kinney & Co. v. First, etc., Bank*, 67 Pac. Rep. 471 (Wy.).

This result must be reached upon one of two wholly independent grounds not properly distinguished by the court. Delivery of part of the flock to the sub-vendee must be held a good delivery of the remainder, or else delivery must be held unnecessary as against the attaching creditor. If delivery is essential it is generally conceded that delivery of part as of the whole satisfies the requirement. *Hobbs v. Carr*, 127 Mass. 532. But in the principal case the partial delivery was not accepted as constructively a delivery of the whole. In so far, therefore, as the court relies upon a delivery the case seems unsound. The result may, however, be validly reached upon the other view considered by the court, that delivery will not be required where a vendee has used due diligence in acquiring possession. This view is supported by recognized authority. *Meade v. Smith*, 16 Conn. 346; *Walden v. Murdock*, 23 Cal. 540. It is opposed, however, to authority of perhaps equal weight. *Lanfear v. Sumner*, 17 Mass. 110. The result of the decision, thus considered, seems to be in effect to place Wyoming among the jurisdictions that follow the doctrine of *Meade v. Smith*, *supra*. See also *State, etc., v. Hellman*, 20 Mo. App. 304; but *cf. Morgan v. Taylor*, 32 Tex. 363.

**TORTS — RES JUDICATA — DAMAGES TO PERSON AND PROPERTY FROM ONE WRONGFUL ACT.** — The plaintiff's wagon collided with a gravel-heap negligently left by the defendant. The plaintiff began one action for damages to his vehicle and another for personal damages. In the former action he was successful. *Held*, that he may notwithstanding recover in the second action. *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40.

Public policy requires that one cause of action be not twice sued on. 2 BLACK, JUDGMENTS, § 725. Therefore no recovery may be had for later accruing damages. *Fetter v. Beal*, 1 Ld. Raym. 339. Nor can two suits be brought for one wrongful act injuring two similar rights of the plaintiff. *Knowlton v. New York, etc., R. R. Co.*, 147 Mass. 606; *cf. Missouri Pac. Ry. Co. v. Scammon*, 41 Kan. 521. When, as in the principal case, one wrongful act damages person and property, although two dissimilar rights are injured, probably in most jurisdictions recovery for both injuries may be had in a single action. *Cf. Howe v. Peckham*, 10 Barb. (N. Y.) 656. If a single action suffices, the reasons of expediency preventing two suits for damages of one kind ought ordinarily, to prevent two suits when the damages are of different kinds. *King v. Chicago, etc. Ry. Co.*, 80 Minn. 83; *contra, Brunsden v. Humphrey*, 14 Q. B. D. 141; *cf. Doran v. Cohen*, 147 Mass. 342. Yet because a claim for personal damages is commonly not assignable, while one for damages to property is, and because the statutes of limitations for the claims may differ, it is sometimes convenient to keep the claims separate. See 15 HARV. L. REV. 229. In such cases, if necessary, two actions might properly be allowed; but this should be only for special reasons, which do not seem to have been present in the principal case.

**TRUSTS — CONSTRUCTIVE TRUSTS — CONVEYANCE OF LAND ON GRANTEE'S PROMISE TO PAY MONEY TO THIRD PERSON.** — One J., being in his last illness and desiring to distribute his property, two months before his death conveyed certain land to his wife, the defendant, on her express oral promise to pay a specified sum to his grandchild, the plaintiff. The defendant had no other property. *Held*, that equity will declare the defendant a trustee *ex maleficio* and compel her to turn over the promised sum to the plaintiff. *Ahrens v. Jones*, 169 N. Y. 555.

Owing to the unfortunate limitation in New York of the sole beneficiary doctrine held in most of the states, the plaintiff could not recover on the contract. *Durnherr v. Rau*, 135 N. Y. 219. The court, wishing to work out the plaintiff's rights, relied on the rule established in the somewhat analogous cases of wills. A devisee of land on an oral trust, unenforceable under the Statute of Frauds, is held a constructive trustee for the intended beneficiary. *Trustees of Amherst College v. Ritch*, 151 N. Y. 282. In the principal case, however, the grantor apparently did not intend to create a trust. The defendant incurred a contractual obligation unconnected with her ownership of the land. Moreover, the principle relied on has not been generally ex-

tended to cover conveyances *inter vivos*. *Campbell v. Brown*, 129 Mass. 23; but see *Goldsmith v. Goldsmith*, 145 N. Y. 313; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 296. If, however, the defendant, when she obtained the deed, intended not to perform, she by fraud prevented the plaintiff from acquiring property and unjustly enriched herself, and equity, though not constituting the defendant a trustee, might perhaps give specific reparation for the tort. If the defendant took the conveyance in good faith and later changed her intention, it is difficult to see any remedy for the plaintiff consistent with the New York sole beneficiary doctrine.

**TRUSTS — EQUITABLE ATTACHMENT OF TRUSTEES' RIGHT OF EXONERATION — DEFAULT OF ONE TRUSTEE.** — Three trustees jointly carried on a business, and in the legitimate conduct thereof incurred certain debts. One of the trustees proved a defaulter, but the other two had clear accounts. The creditors demand the right to come against the trust fund for the amount of their claims, by applying to the payment of their claims the right of exoneration of the non-defaulting trustees. *Held*, that they may do so. *In re Frith*, [1902] 1 Ch. 342.

For whatever debts the trustees incur in the legitimate course of business, they have a right not only to indemnify themselves from the trust fund, but even to draw on it directly to meet such claims. *Gosborne v. Charter Oak Life Ins. Co.*, 142 U. S. 326; *Dowse v. Gorton*, [1891] A. C. 190. This right, as an existing asset, the creditors of the business may reach in equity. See *Ex parte Garland*, 10 Ves. 110. But their right is no greater than that of their debtor, so where there is but a single trustee and he defaults, since his right is gone, there is no asset which the creditor can reach. *In re Johnson*, 15 Ch. D. 548. In the principal case, however, the default of one trustee did not affect the right of the two non-defaulting trustees to exoneration. Although it might be said that their ultimate loss could be only their share of the debt, since they could get contribution from the defaulter, still the debt being joint, they could be forced originally to pay it all. To meet this liability they would be entitled to draw upon the trust fund. It seems entirely in accord with the general principle then, that the creditors should get the benefit of this right.

**TRUSTS — LIABILITY OF TRUSTEE DEALING WITH THE RES.** — A trustee kept the trust funds in a separate account at a London bank. As he lived in the country, his solicitors had the pass-book and check-book, and when payments were to be made on account of the trust estate, sent checks for signature to the trustee with explanatory letters. A clerk of the solicitors, by a forged telegram and letter purporting to come from them, induced the trustee to sign certain checks drawn to bearer, with the proceeds of which the clerk absconded. *Held*, that the trustee is not liable to the beneficiary for this sum. *Re Smith*, 46 Sol. J. 358 (Eng., Ch. D.).

If it can be deduced from the facts that the trustee delegated to agents the duty of managing the trust estate, the trustee would be liable for any unlawful dealing by those agents or their servants. See *Re Speight*, 22 Ch. D. 727, 756; *Learoyd v. Whiteley*, 12 App. Cas. 727, 733. The principal case may, however, be criticised on a broader ground. In the management of a trust estate the trustee ordinarily need use only such care as a reasonably prudent man would use in the management of his own property. *Learoyd v. Whiteley*, *supra*. This principle is subject to limitations. It applies very generally to acts done in respect to the custody, conversion, or investment of trust property. See *Speight v. Gaunt*, 9 App. Cas. 1. When, however, the trustee undertakes to pay out from the trust fund to the *cestui* or to creditors, he is held to a stricter accountability. *Bostock v. Floyer*, L. R. 1 Eq. 26; *Rowland v. Witherden*, 3 Mac. & G. 568. Thus, a trustee has been held liable where, deceived by a forgery, he has paid money to the wrong person. *Eaves v. Hickson*, 30 Beav. 136; *Cutler v. Boyd*, 60 L. T. N. s. 859. It is difficult to distinguish these cases from the principal case, and a decision against the trustee here would seem to accord better with the general principles governing the liability of those who have charge of the property of others and undertake to deal with it.

**TRUSTS — TRUST VOID UNDER STATUTE OF FRAUDS — TRUST RESULTING FROM PAYMENT OF CONSIDERATION.** — M purchased land, causing the legal title to be conveyed to B, though without the latter's knowledge. M intended thereby to benefit X, but no trust valid under the Statute of Frauds was declared. B, upon learning of the conveyance, refused to hold for X and claimed complete rights in the land. M brought a bill against B for conveyance to herself. *Held*, that B must convey, there being a resulting trust for M. *In re Davis*, 112 Fed. Rep. 129 (Dist. Ct., Mass.)

The final decision does not seem open to question. *Cf. Easterbrooks v. Tillinghast* 5 Gray (Mass.) 17. The common error was made, however, of confusing this with the ordinary case where property is conveyed to one person and consideration paid by another. In such cases, a resulting trust is presumed from the supposed intention of the parties, as a resulting use formerly was from a feoffment without consideration. *Powell v. Munson, etc., Co.*, 3 Mason (U. S. Circ. Ct.) 347, 361; *White v. Carpenter*, 2 Paige Ch. (N. Y.) 217, 238. See *Dyer v. Dyer*, 2 Cox 92, 93. But this presumption is rebuttable and in the principal case it appeared clearly that no trust for A was originally intended. The case belongs to that class in which the trust is raised entirely from the court's sense of justice, without reference to the intention of the grantor. *Cf. Lord North v. Purdon*, 2 Ves. Sen. 494. The grounds are the same as those upon which a trust arises in favor of a grantor whose conveyance was procured by fraud. *Long v. Fox*, 100 Ill. 43. It follows that in jurisdictions where a willing trustee is allowed to carry out a trust insufficiently declared, the rights of the parties in cases like the principal case would not be determined until the trustee indicates his position. Even where failure to observe the distinction would have no important practical results, it should not, in the interests of clear reasoning, be overlooked.

**WILLS — REVOCATION — PRESUMPTION FROM MUTILATION.** — A will presented for probate showed that the signatures of the testatrix and witnesses had been cut off, and then reaffixed with paste. There was no evidence as to who did the cutting, nor when it was done. *Held*, that these facts raise no presumption for or against the validity of the will. *Webster v. Yorty*, 62 N. E. Rep. 907 (Ill., Sup. Ct.).

The authorities cited by the court are not exactly in point, holding merely that when an alteration appears in an instrument, it is a question of fact, unaffected by any presumption, whether the change was made before or after execution. *Reed v. Kemp*, 16 Ill. 445. In the principal case there are two questions: first, whether the cutting was done by the testator, and second, with what intent it was done. On the first question it seems proper to hold that there is no presumption. But if the cutting is found to have been done by the testator, the English courts have presumed an intent to revoke. *Bell v. Fothergill*, L. R. 2 P. & D. 148. In America, although no case precisely in point has been found, there is a similar presumption in the analogous case of a missing will which, when last known to have been in existence, was in the possession of the testator, and the absence of which cannot be accounted for. *Collyer v. Collyer*, 110 N. Y. 481. In so far then, as the court says that there can be no presumption at all in the principal case, the ruling seems inaccurate.

**WILLS — REVOCATION BY RATIFYING PREVIOUS MUTILATION.** — In a contest as to the validity of a will, which had been much mutilated by vermin in the testator's lifetime, it appeared that the testator had considered the mutilation as invalidating the will. *Held*, that if the testator orally ratified the defacement by the vermin, he thereby revoked the will. *Cutler v. Cutler*, 40 S. E. Rep. 689 (N. C.).

In general, the statutes regulating wills provide that a revocation may be effected by certain forms of mutilation by the testator, or by another at his direction and in his presence, provided there is the requisite intent. Having established definite requirements, these statutes impliedly exclude all others. *Runkel v. Gates*, 11 Ind. 95. The precise point of the principal case seems never before to have been decided. Nevertheless, it has been thought that by adopting the loss or destruction of his will, a testator might revoke it. See *Steele v. Price*, 5 B. Mon. (Ky.) 58; UNDERHILL, WILLS, 308; but see *contra*, *Mills v. Millward*, 15 P. D. 20. On the other hand, the destruction of a will by the testator's direction has been held nugatory because not done in his presence. *Dower v. Seeds*, 28 W. Va. 113. It will occasionally be unfortunate if a testator may not orally ratify the mutilation or destruction of his will; yet such ratification does not fulfil the requirements of the statutes, that the necessary intention concur with the revoking act, and that the destruction be in the testator's presence. The adequate protection of testamentary dispositions of property seems to demand a strict construction of the statutes. A contrary decision in the principal case, therefore, would seem more in harmony with the objects of such legislation.



## BOOKS AND PERIODICALS.

**CRIMINAL RESPONSIBILITY OF INSANE DRUNKARDS.**—It has long been familiar law that mere intoxication is not a defence to a criminal charge; and that certain forms of insanity are defences. 1 HAWK., P. C., c. I. §§ 1, 6. How far insanity caused by intoxication will excuse has not always been equally well settled. Permanent insanity so caused has been invariably held a valid excuse. 1 HALE, P. C., 32. So also has *delirium tremens*. *Reg. v. Davis*, 14 Cox, C. C., 563; *People v. Rogers*, 18 N. Y. 9. As to the extent to which temporary insanity caused by drunkenness negatives culpability, an instructive discussion is found in a late English periodical. *Drunkenness and Crime*, by R. W. Lee, 27 L. Mag. & Rev. 144 (Feb., 1902). The author professes to record a change in the English law. He asserts that formerly temporary insanity resulting from intoxication was not a defence under the English law, but that it now is a defence and rightly so. Pertinent *dicta* are cited which lend color to such a suggestion, but in actual decision he finds no early case holding that temporary insanity is not an excuse and no modern case holding that temporary insanity, aside from *delirium tremens*, is an excuse. Cf. *Rennie's Case*, 1 Lew. 76, and *Reg. v. Davis*, *supra*. The conclusion, then, that the law has undergone a change on the point seems somewhat hasty.

In support of the general proposition that temporary insanity should be a defence, the author cites only cases of *delirium tremens*. Even if this disease can be regarded as a temporary insanity, as seems not impossible, his position is certainly too broad and indiscriminating. It would be interesting to see with what consistency he would apply his doctrine to the case where insanity is an immediate concomitant of intoxication,—as it is said to be in some abnormal subjects, either because of some injury or because of peculiar nervous susceptibility,—and where therefore the insanity is just as probable a consequence as the drunkenness itself. See 2 TAYL., MED. JUR., 4th ed., 596; 3 TWENT. CENT. PRAC. MED., 11, 12. His position seems still more doubtful when it is remembered that from a pathological standpoint mere intoxication and some forms of insanity are largely identical and that the line separating drunkenness and temporary insanity caused by drunkenness is exceedingly vague. See KERR, INEBRIETY, 3d ed., 15 *et seq.*

The author's statement finds little support in America. In this country, temporary insanity resulting immediately from intoxication—leaving *delirium tremens* aside—is said to be no defence. *State v. Hundley*, 46 Mo. 414. It is true that *delirium tremens* has not failed of excusing in any well-considered case. And yet as an original matter it would be hard to see why some victims even of this disease should not be punished, more especially when the attack of the disease is not the first. The English courts recognize *delirium tremens* as a defence on the ground that it is a secondary and not a primary consequence of drinking. *Reg. v. Davis*, *supra*. Some American courts regard it as a settled insanity, or what Lord Hale termed a "fixed frenzy," and dispose of it on that ground. *People v. Rogers*, *supra*. Others allege that it supervenes only upon a period of abstinence, and so find no difficulty in excusing. *Kelley v. State*, 31 Tex. Cr. Rep. 216. But these reasons seem inadequate, especially the last; for the notion that *delirium tremens* is caused only by cutting off the drunkard's supply of liquor was long since questioned. 3 TWENT. CENT. PRAC. MED., 13; cf. 1 WHART. & ST. MED. JUR., § 203. Only in those instances, then, where *delirium tremens* can fairly be called a remote consequence of drinking, as where it follows a period of abstinence, should it be a defence; otherwise it should not. If insanity follows immediately upon the drunken state, the mere fact that it assumes the form of *delirium tremens* rather than some other form can make no difference in principle and should not excuse.

Such a result seems to violate neither logic nor sound policy. The decisive question should simply be whether in a given case the temporary frenzy can fairly be said to be voluntary. If a drunkard has reason to anticipate as a possible consequence of his intemperance not only intoxication but insanity as well, he should have no defence from either; he has voluntarily put himself in an uncontrollable condition and the policy of the law should hold him to the strictest accountability; to treat him on any other basis would be to protect grossest excess.

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**LEGALITY OF VOTING TRUSTS.**—The view that voting trusts are, as a general rule, illegal as against public policy is defended in a recent article. *Voting Trusts in Corporations*, by E. W. Moore, 36 Am. L. Rev. 222 (March-April, 1902). Mr. Moore quotes with effect from the earlier cases but fails to refer to important recent decisions.

The argument for the intrinsic illegality of voting trusts is that the interests of the state and of the stockholders demand that at least once a year the majority of stockholders shall have an opportunity to determine the corporation's policy. A separation of the voting power and the beneficial interest for a longer period is said to be unwise, and opposed to the policy of the state as shown by statutes providing for annual corporate elections. It is further urged that as the trustees who exercise the control may have no pecuniary interest, such arrangements may result in irresponsible and arbitrary management. See *Harvey v. Linville Improvement Co.*, 118 N. C. 693; *Shepaug Voting Trust Cases*, 60 Conn. (Supp.) 553; 1 Yale L. J. 1.

On the other hand, business experience has shown that stability of management may be absolutely essential to success. On the reorganization of a railroad, capitalists cannot be interested nor the desired officers secured if there is no assurance of continuity of policy. Such men are unwilling to rely on the patience and judgment of the ordinary stockholder. It is true that voting trusts make possible control by a minority or by outsiders. Their very object is to make sure that a certain policy shall be continued or a certain set of men retained in office despite the opposition of future majorities. Such a result is inconsistent with the old conception of a corporation; but conditions have changed. The early simple business corporations were under the continuous and direct control of the individual corporators. When such immediate control became impossible as corporations increased in number of stockholders and complexity of management, the delegation of power to a smaller body of experienced men became necessary and the law sanctioned the annual election of directors. Business experience now shows the necessity of allowing the delegation of power for a still longer period. Voting trusts may, undoubtedly, be void for special reasons, as where the aim is unjust personal advantage. *Cone v. Russell*, 48 N. J. Eq. 208. But broad grounds of business expediency seem to demand that it should be possible for a majority of stockholders acting in good faith to bind themselves irrevocably for a term of years to support a certain policy. The influence of commercial necessity is apparent in the more liberal attitude toward which the courts are tending. See *Brightman v. Bates*, 175 Mass. 105; *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584; 10 HARV. L. REV. 428.

Mr. Moore points out that the courts have recognized the validity of voting trusts which are for the security of creditors, and distinguishes between agreements for that purpose and for all others. See *Mobile & Ohio R. R. Co. v. Nicholas*, 98 Ala. 92. He bases this distinction chiefly on the ground that if the trustees are under the direction of the creditors, the objection that the beneficial interest is separated from the control does not apply. The importance of the distinction is diminished, however, when it is remembered that even in trusts for the benefit of creditors, the control may be given to men who have no beneficial interest. It seems probable that if the courts fail to sustain such arrangements, the desired result will be reached by statute.

**BANK'S LIABILITY FOR DISHONOR OF CHECK.**—When a bank fails without just excuse to honor a depositor's check, the latter may sue either in contract or in tort. *Marzetti v. Williams*, 1 B. & Ad. 415; *Burroughs v. Tradesmen's Nat. Bank*, 87 Hun (N. Y.) 6. The contractual obligation is implied in the very nature of the relation of the bank to the depositor. The basis of the tort liability, however, is not altogether clear. In a recent article Professor Huffcut advances two theories as possible grounds for supporting the tort action: first, that the act of wrongful dishonor is "an unnamed tort analogous to a slander of title or disparagement of goods or credit;" or, secondly, that it is a violation of a duty imposed by the policy of the law upon banking institutions as quasi-public agencies. The former theory he accepts; the latter he condemns. *Liability of a Bank to the Maker of a Check for the Wrongful Dishonor Thereof*, by Ernest W. Huffcut, 2 Colum. L. Rev. 193 (April, 1902).

While the soundness of the latter theory is perhaps doubtful, the author's argument against it seems incomplete. His statement that the tort in question can be committed by any private individual as well as by a bank, and that a bank requires no public franchise, is inconclusive; for carriers and telegraph companies need not be incorporated, nor need they secure public franchises, and yet the law imposes upon them a liability that is more than contractual. A stronger argument against the theory Professor Huffcut appears to have entirely overlooked. If it were true that banks were under a general duty analogous to that imposed on carriers, it would follow that there could be no discrimination by a bank; no accounts could be refused so long as reasonable compensation were assured by the applicants. Cf. *Jackson v. Rogers*, 2 Show. 327. Such a result would hardly be desirable.

In support of the theory that a wrongful dishonor is a slander of credit the author quotes suggestive language from cases and text-writers. *Marzetti v. Williams*, *supra*, at 424; ODGERS, LIBEL AND SLANDER, 3d ed., 13. No cited case distinctly says that slander of credit is the basis of the action and yet it is to be noted that in most cases of dishonor the damage produced is of precisely the same kind that would result from intentional verbal slander of business reputation. The only question, then, is whether this similarity of damage warrants the inference that slander and wrongful dishonor of checks have a common basis in the recognized duty to refrain from disparaging the character or business of another. Such a conclusion is not logically necessary and its soundness may perhaps be questioned. It is, however, preferable to the other view suggested.

In fairness it may be added that the "quasi-public agency" theory, if adopted, might furnish a convenient explanation of those cases which allow the payee, as well as the maker, a direct remedy against the bank. See *Munn v. Burch*, 25 Ill. 35. At present they are often rested on an unsatisfactory theory of equitable assignment. See TIED., COM'L PAPER, § 452; 11 HARV. L. REV. 548.

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**PRINCIPLES OF CONTRACT.** A treatise on the general principles concerning the validity of agreements in the law of England. Seventh edition. By Sir Frederick Pollock, Bart. London: Stevens and Sons, Limited. 1902. pp. li, 768. 8vo.

The new edition of this well known book is not materially changed from the sixth edition, which was published in 1894. The author has somewhat retrenched the space given to the discussion of questions of comparative law and topics not falling necessarily within the law of contracts. The most considerable alterations are in the earlier chapters. What is said of corporations has been condensed; the historical account of consideration has been rewritten,

with acknowledgment of indebtedness to Professor Ames, "who has put the whole subject on a new footing." An excursus on the Roman and mediæval law of contracts has been transferred with some revision from the text of Chapter III. to the Appendix. In Chapter VII the rules as to contracts in restraint of trade have been reduced to a much simpler form in consequence of the decision of the House of Lords in Nordenfeld's case. The chapters on Consideration and on Illegal Contracts have been expanded more than any others. All these changes commend themselves.

On the vexed question whether the promise or performance of an act to which the promisor or actor was already bound to a third person is a sufficient consideration, the author returns to the theory set forth in his first edition (which is also the view of Professor Langdell) that such a promise is good consideration for another promise, though performance of the act is not. In the intermediate editions of his work and especially in his article on Contracts in the Encyclopedia of the Laws of England the author has not always clearly held to this view.

It is matter for regret, though not for criticism, that the author has not found time or inclination to enlarge the scope of his work so as to cover the performance and discharge of contracts. The original plan of the book included neither of these topics. The chapter entitled Duties under Contract, first inserted in the fifth edition, though excellent so far as it goes, is hardly an adequate presentation of the subject with which it deals; and the whole topic of discharge of contracts, as well as one or two other subjects usually dealt with in books on the law of contracts, are still wholly untouched. Sir Frederick Pollock's gift of easy and graceful exposition would make any enlargement welcome.

In the citation of recent authorities this edition leaves something to be desired. The following omissions have been noted: *Rooke v. Dawson*, [1895] 1 Ch. 480, deciding that an announcement of a scholarship competition was not an offer; *Page v. Norfolk*, 70 L. T. 781, illustrating the necessity of having the terms of a bargain fixed by the parties, not left for a subsequent "detailed contract;" *Falck v. Williams*, [1900] A. C. 176, on mistake preventing the formation of a contract; *Ashwell v. Stanton*, 16 T. L. R. 399, a questionable decision upon the elements of consideration; *Ashmore v. Cox*, [1899] 1 Q. B. 436, on impossibility as a defence; *Cleaver v. Mut. Reserve Fund Life Assoc.*, [1892] 1 Q. B. 147, *Gandy v. Gandy* 30 Ch. D. 57, *Drimmie v. Davies*, [1899] 1 Ir. Rep. 176, upon the right of one not a party to a contract to enforce its provisions. At page 269 the author's just criticism of the rule of *Freeth v. Burr* is not accompanied by the citation of *Rhymney Ry. Co. v. Brecon Ry. Co.*, 83 L. T. 111, and *Cornwall v. Henson*, [1900] 2 Ch. 298, where the rule criticised is again laid down as accurate. The equally sound criticism of *Fellowes v. Lord Gwydyr*, on page 107, has been justified by the decision in *Archer v. Stone*, 78 L. T. 34, but no reference is made to the latter case. S. W.

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A MANUAL OF THE PRINCIPLES OF EQUITY. By John Indermaur. Fifth edition. London: Geo. Barber. 1902. pp. xxxii, 574. 8vo.

The author of this book has attempted to write a manual "specially suitable for students . . . but at the same time intended to be useful in a limited way to practitioners." This must of necessity be a difficult task, as the needs of his two classes of readers are so inherently dissimilar that they cannot be merged. The one wants to know merely what and where the law is on a given point; while the other demands both what and why it is, and whence it came. Mr. Indermaur is to be congratulated on having answered most of these questions concisely and accurately, but he has, by not answering the "why" of the law, made a practitioner's handbook rather than a student's manual. He has given us no theory; he offers twelve maxims which are to do duty instead. Thus he dismisses the very debatable doctrine of "tacking" with the remark that "where the equities are equal the law prevails," — hardly an adequate treat-

ment of the subject. The question of specific performance of negative contracts is left as though perfectly clear and simple, whereas in fact the decisions are not only irreconcilable, but are founded on diverse legal reasoning.

Yet the merits of the work are far too striking to be overshadowed by the lack of theoretical insight. The reader notes with relief the absence of the usually oppressive footnote; and the marginal citation of important cases should prove useful in familiarizing the student with the leading decisions on all the topics treated in the text. The text itself is admirable, containing the gist of the law concisely stated. The style is vigorous smooth, and especially well adapted to the ends attained.

For the divisions of the book there can be little but praise. Yet it certainly strikes American eyes with wonder to see "Injunctions" accorded only twenty pages, while "Married Women" is given thirty-five. Perhaps the chapter on Administration deserves especial mention; it is complete, accurate, and shows great care in composition, having in fact been entirely rewritten since the last edition. The work should prove of undoubted value to the English practising lawyer, not to the American because too full of the English procedure and statutes, nor to the student of either nationality because too narrow in its scope.

**A TREATISE ON GUARANTY INSURANCE;** Including therein as Subsidiary Branches the Law of Fidelity, Commercial, and Judicial Insurances, covering all forms of Compensated Suretyship, such as Official and Private Fidelity Bonds, Building Bonds, Credit Bonds, Credit and Title Insurances. By Thomas Gold Frost. Boston: Little, Brown, & Company. 1902. pp. xxxviii, 547. 8vo.

The business of a surety company presents many new and special questions of law, and it is to these questions and to judicial decisions upon them that the author confines himself. These bounds to his subject he considers natural, for he discerns a fundamental difference between a contract of guaranty made by an individual and a contract embracing the same subject-matter made by a surety company. The gist of the distinction he finds in the fact that, in general, undertakings of the former sort are gratuitous and those of the latter, compensated. He points out further that a surety company is like an insurance company in its business scheme; for example, in its system of computing premiums and in its preliminary investigation of risks. Accordingly on page 15 he affirms "unqualifiedly" that "fidelity, commercial, and judicial bonds or policies as issued by the so-called surety companies constitute a contract of insurance within the strict legal signification of that term." In making this proposition fundamental the author is aware that he is advocating a departure from the less novel view that such contracts of a surety company as are made with reference to some principal obligation of a third person are contracts of suretyship. He naturally, therefore, devotes considerable space throughout the book to developing and justifying his theory.

The present state of the law is hardly referable to this conception, that every surety company's bond is an insurance policy. The authorities relied upon decide merely that a surety company is an insurance company within the meaning of some statute, or that in construing a contract the court should incline against the surety company, since the language of the contract is invariably of the company's own dictation. Decisions of the first sort simply recognize the surety company's undoubted similarity to an insurance company in business methods; the others follow a canon of construction of no peculiar application to insurance policies. See *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 49. It seems an overrating of these decisions to conclude the chapter in which they are cited by an expression of opinion, unsupported by other authority, that the contracts of a surety company are, like insurance contracts generally, not within the Statute of Frauds. A further illustration of the extreme to which the author's theory leads him is in § 30, where, in declaring that there can be no guaranty insurance unless the insured has an insurable interest,



he is really restating the rule that there can be no suretyship unless there be a principal obligation. He frankly confesses, however, that the decisions which support his proposition do not treat the question as one of insurable interest. In many other passages doctrines peculiar to suretyship appear unmistakably. For example, in § 128 the defence that time has been given the principal debtor, distinctly the technical defence of a surety rather than an insurer, is said to be available to a surety company on a fidelity bond. Moreover, the author shows, in § 116, that the existence of a valid right of subrogation against the "risk" is a prerequisite of the surety company's liability. This well recognized principle of suretyship does not generally apply to qualify the liability of an insurer. The decisions which are cited to establish these statements would seem to show that many of the usual contracts of surety companies still have, in the minds of the judges, the characteristics of suretyship.

The external form of the volume is attractive, but there are traces of haste in the composition. The method of treatment is discursive and casual, and there is a tendency toward detailed statement of individual cases and more or less repetition of ideas. Much improvement would result from rearrangement and condensation. As it is, the book is more readable than instructive.

LECTURES ON SLAVONIC LAW. By Feodor Segel, Professor of Law in the University of Warsaw. London: Henry Frowde. New York: Oxford University Press, American Branch. 1902. pp. vii, 152. 12mo.

A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY. By Emory Washburn, Bussey Professor of Law in Harvard University. Sixth Edition by John Wurts, Professor of the Law of Real Property in the Yale Law School. 3 vols. Boston: Little, Brown & Co. 1902. pp. clxx, 579; 706; 636. 8vo.

THE NEGOTIABLE INSTRUMENTS LAW, WITH COPIOUS NOTES. By John J. Crawford. Second edition, New York: Baker, Voorhis, & Co. 1902. pp. xxxiv, 173. 8vo.

AMERICAN ELECTRICAL CASES, being a collection of important cases (excepting patent cases) decided in the state and federal courts of the United States from 1873 on subjects relating to the telegraph, the telephone, electric light and power, electric railway and other practical uses of electricity, with annotations. Edited by William W. Morrill. Volume VII. 1897-1901. Albany: Matthew Bender. 1902. pp. xxiv, 940. 8vo.

THE LAW OF INSURANCE — FIRE, LIFE, ACCIDENT, GUARANTEE. By William A. Kerr. St. Paul: Keefe-Davidson Co. 1902. pp. xi, 917. 8vo.

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## CONTRACTS FOR THE BENEFIT OF A THIRD PERSON.

“**I**N no department of the law has a more obstinate and persistent battle between practice and theory been waged than in regard to the answer to the question : Whether a right of action accrues to a third person from a contract made by others for his benefit ? Nor is the strife ended ; for if it be granted that the scale inclines in favor of practice, yet the advocates of this result are continually endeavoring to extend the territory which they have conquered and to apply the doctrines thereby established to cases which should be governed by other principles.”

These sentences are translated from the opening lines of a German treatise.<sup>1</sup> The fact that they are as applicable to the common law in America as to the system of law of which the author wrote is enough to show that the subject presents intrinsic difficulties. But no one who examines the cases carefully can fail to note how much confusion has been caused by neglect of important distinctions. The first step towards a clear understanding of contracts for the benefit of third persons is to differentiate several legally distinct states of fact in which third persons are interested.

Rights of property may arise simultaneously with the making of a contract, and may be enforced by the owner though he was not a party to the contract. His right of action is not based on the law

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<sup>1</sup> Busch, *Doctrin und Praxis über die Gültigkeit von Verträgen zu Gunsten Dritter.* (Heidelberg, 1860.)

of contracts, but on the law of property. Such a right may be legal or equitable. When a seller ships goods in fulfilment of an order, for instance, the legal title to the goods ordinarily passes to the consignee at the time of shipment, which is the time when the carrier contracts with the consignor to deliver the goods to the consignee. If the carrier loses or misdelivers the goods the consignee can sue the carrier or indeed any one else who may have dealt with the goods wrongfully, not by virtue of the contract which the carrier has made, but because of the rights of property which arose when that contract was made. If, indeed, the liability of the carrier depends wholly on a promise in the bill of lading, then the question must arise, who can sue on the contract contained in the bill of lading.<sup>1</sup> The case of the carrier is typical. Whenever property other than negotiable paper or money is delivered, in accordance with a contract of sale, to a third person for the purchaser, the title will ordinarily pass to the purchaser at that time, and he will acquire a right of action though not a party to the contract made between the seller and bailee. The right of property transferred in many cases, however, is equitable. Whenever property is delivered to one person under such circumstances that the legal title passes to him, but he undertakes to deliver that specific property or its proceeds to a third person or use the property for his benefit, the relation of trustee and *cestui que trust* arises. When money or negotiable paper payable to bearer or indorsed in blank is delivered to another the legal title will generally if not necessarily pass, and the right of the person for whose benefit the delivery is made will be equitable, though in the case of money the appropriate remedy of the *cestui que trust* is ordinarily money had and received.<sup>2</sup> The fact that the remedy in such cases is in assumpsit has often blinded courts to the fact that the right of action is not based on principles of contract.<sup>3</sup>

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<sup>1</sup> See Elliott on Railroads, § 1692.

<sup>2</sup> "Whenever one person has in possession money which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances." *Roberts v. Ely*, 113 N. Y. 128, 131. See also *McKee v. Lamon*, 159 U. S. 317, 322; *Nebraska Bank v. Nebraska Hydraulic Co.*, 14 Fed. Rep. 763.

<sup>3</sup> The mistakes are twofold. Cases of trust are treated as involving merely questions of contract. *Allen v. Thomas*, 3 Met. (Ky.) 198; *Price v. Trusdell*, 28 N. J. Eq. 200, 202; *Bennett v. Merchantville Building Assoc.*, 44 N. J. Eq. 116; *Del. & Hudson Canal Co. v. Westchester Bank*, 4 Denio 97. Cases of mere contract rights are called

Such rights of property are not generally hard to distinguish from contract rights, though in many cases courts have confused the two. The inquiry whether a specific fund or *res* is to be transferred to the beneficiary furnishes a ready test.

More difficult than the distinction between contract rights and property rights is the distinction between cases involving the latter and cases of revocable agency. Unquestionably a man can create a trust for the benefit of another so absolute that the settlor cannot regain the property forming the subject of the trust. On the other hand, one may give money or property to an agent with instructions to give it to a third person, and before the mandate is executed it may be revoked. Where is the line which divides the first from the second case. No other test can be found than that furnished by the intention of the settlor or principal as indicated by his words and conduct, when he enters into the transaction. If his expressed intention read in connection with all the circumstances of the case indicates that the delivery was to be a finality, that the money or property was to be from that moment dedicated to the third person, the law will give effect to the intention and give the latter a property right from that time. It is true that this cannot be done against his will, but if there is no duty or obligation required from him in return for the property he is to receive, no expression of assent is required.<sup>1</sup> Assent may be implied or it may be said perhaps more accurately that the property right vests without assent subject to the possibility of rejection. On the other hand, if the use of the money or property was intended to be subject to the directions of the person delivering it, if the holding was for his benefit and under his orders, the relation is that of principal and agent and the third person can acquire no rights until the agency has been executed either by actual transfer to the third person or by some express or implied attornment to him by the agent. Mere notice to the third person that an agency has been created cannot make it irrevocable, nor can even acceptance or change of position by the third person, unless either the principal or the agent with authority from the principal has made an offer that the holding shall be for the benefit of the third party if he so elects.

The statement of these principles is easier than the application

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trusts. *Follansbee v. Johnson*, 28 Minn. 311; *Rogers v. Gosnell*, 51 Mo. 469. The true distinction is well presented by the facts and is explained in the opinions in *Fay v. Sanderson*, 48 Mich. 259; *Hidden v. Chappel*, 48 Mich. 527. See also *Belknap v. Bender*, 75 N. Y. 446; *Roberts v. Ely*, 113 N. Y. 128.

<sup>1</sup> Ames, *Cas. Trusts*, 2d ed., 232, note; Perry on Trusts, 5th ed., § 105.

of them to concrete facts. One of the commonest cases involving the distinction is that of a general assignment by a debtor for the benefit of his creditors. The English courts hold that the delivery of such an assignment vests no rights in the creditors.<sup>1</sup> Yet it gives rise to something more than a mere agency, for when the creditors assent, the assignment cannot be revoked.<sup>2</sup> It is in effect, therefore, under the English view, an offer to the creditors of a trust for their benefit. Until the offer is accepted, but no longer, the assignee is agent or trustee for the assignor. In the United States such assignments are held, with better reason, to create irrevocable trusts from the moment the deed is executed.<sup>3</sup>

Another illustration is furnished by the facts of a New York case.<sup>4</sup> Money was deposited in a bank by a corporation which owed coupon bonds to meet a series of coupons about to fall due. The bank agreed to apply the money to the payment of the coupons. Before the coupons had actually been paid a creditor of the corporation sued it, and garnisheed the bank. It was held that the bank had become a trustee for the coupon holders, and that the corporation had no right which could be attached. But where goods were put into A's hands, to sell as the owner should direct and distribute the proceeds among certain creditors, it was held that only a revocable agency was created.<sup>5</sup> So where an agent who received money from his principal to pay over to a creditor subsequently used the money otherwise for his principal's benefit, and the principal assented, it was held that the creditor had acquired no rights.<sup>6</sup>

In another respect the law of agency touches the borderland of contracts for the benefit of a third person. It is familiar law that if a contracting party either is or assumes to be the agent of another, the latter may sue upon the contract. The right of a third person benefited by a contract to sue upon it has sometimes been defended on the ground that the promisee was the agent of the third person. But the existence of an agency is a question of fact. It cannot be assumed as a convenient piece of machinery when in fact there was no agency.

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<sup>1</sup> *Garrard v. Lauderdale*, 3 Sim. 1; *Smith v. Keating*, 6 C. B. 136.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Burrill on Assignments*, 6th ed., § 257 *seq.*

<sup>4</sup> *Rogers Locomotive Works v. Kelley*, 88 N. Y. 234. Compare *Mayer v. Chattahoochee Bank*, 51 Ga. 325.

<sup>5</sup> *Comley v. Dazian*, 114 N. Y. 161. See also *Keithley v. Pitman*, 40 Mo. App. 596; *Kelly v. Babcock*, 49 N. Y. 318.

<sup>6</sup> *Dixon v. Pace*, 63 N. C. 603. See also *Center v. McQuesten*, 18 Kan. 476.



Novations and offers of novation must also be distinguished from the other legal relations with which this paper deals. The aim of the novation is to substitute for an existing obligation another right. To work a novation, it is not enough that a promise has been made to the original debtor to pay the debt; nor does the assent of the creditor help the matter unless an offer was made to him. The theory of novation is that the new debtor contracts with the old debtor that he will pay the debt, and also to the same effect with the creditor, while the latter agrees to accept the new debtor for the old. A novation is not made out by showing that the substituted debtor agreed to pay the debt. It must appear that he agreed with the creditor to do so. Moreover, this agreement must be based on the consideration of the creditor's agreement to look to the new debtor instead of the old. The creditor's assent to hold the new debtor liable is therefore immaterial unless there is assent to give up the original debtor.<sup>1</sup>

Promises for the benefit of a third party must also be distinguished from promises to one who has not given the consideration for the promise. It is laid down in the books that consideration must move from the promisee, and it is sometimes supposed that infringement of this rule is the basis of the objection to allowing an action by a third person upon a promise made for his benefit. Such is not the case. In such promises the consideration does move from the promisee, but the beneficiary who seeks to maintain an action on the promise is not the promisee. The rule that consideration must move from the promisee is somewhat technical, and in a developed system of contract law there seems no good reason why A should not be able for a consideration received from B to make an effective promise to C. Unquestionably he may in the form of a promissory note,<sup>2</sup> and the same result is generally reached in this country in the case of an ordinary simple contract.<sup>3</sup>

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<sup>1</sup> See an article on Novation by Professor Ames, 6 HARV. L. REV. 184. Also *Knisely v. Brown*, 95 Ill. App. 516; *Hamlin v. Drummond*, 91 Me. 175; *Butterfield v. Hartshorn*, 7 N. H. 345; *Warren v. Batchelder*, 15 N. H. 129; *Smart v. Tetherly*, 58 N. H. 310.

<sup>2</sup> *Fanning v. Russell*, 94 Ill. 386; *McIntyre v. Yates*, 104 Ill. 491; *Hall v. Jones*, 78 Ind. 466; *Mize v. Barnes*, 78 Ky. 506; *Eaton v. Libbey*, 165 Mass. 218; *Horn v. Fuller*, 6 N. H. 511; *Farley v. Cleaveland*, 4 Cow. 432; 9 Cow. 739.

<sup>3</sup> *Pigott v. Thompson*, 3 B. & P. 149, by Lord Alvanley; *Bell v. Sappington*, 111 Ga. 391; sec. 2747 Ga. Code; *Schmucker v. Sibert*, 18 Kan. 104, 111; *Cabot v. Haskins*, 3 Pick. 83; *Palmer Bank v. Insurance Co.*, 166 Mass. 189, 195, 196; *Van Eman v. Stanchfield*, 10 Minn. 255; *Gold v. Phillips*, 10 Johns. 412; *Lawrence v. Fox*, 20 N. Y. 268, 270, 271, 276, 277; *Rector v. Teed*, 120 N. Y. 583.

One more preliminary distinction must be made. A trustee can make a contract for the benefit of his *cestui que trust*, and if the contract is not performed may sue and recover full damages. A contract by which A engages to pay B money as trustee for C is unquestionably valid.<sup>1</sup> And if B refuses to enforce the contract, C may bring a bill in equity against A and B, the primary equity of which is to compel the trustee to do his duty, but to avoid multiplicity of actions a court of equity will decree that A pay the money.<sup>2</sup> It is only in case the trustee, who is the promisee, refuses to act, that the beneficiary has a right to sue in this way.<sup>3</sup>

There are two quite distinct types of cases which pass current under the name of promises for the benefit of a third person. To the first class belong promises where the promisee has no pecuniary interest in the performance of the contract, his object in entering into it being the benefit of a third person. To the second class belong promises where the promisee seeks indirectly to discharge an obligation of his own to a third person by securing from the promisor a promise to pay this creditor. These two classes are frequently treated as if their correct solution depended upon the same principles, but there are important distinctions.

The first class is properly called a contract for the benefit of a third person, and the phrase "sole beneficiary" should be reserved for this class. As the promisee has no pecuniary interest in the performance of the promise, he can have, generally speaking, no other intention than to benefit the third person, to give him a right. A typical illustration is a contract of life insurance payable to some one other than the insured. Whatever may be the apparent technical difficulties, it is obvious that justice requires some

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<sup>1</sup> Such contracts are illustrated in *Cope v. Parry*, 2 J. & W. 538; *Treat v. Stanton*, 14 Conn. 445; *Mass. Mut. L. I. Co. v. Robinson*, 98 Ill. 324.

<sup>2</sup> *Gandy v. Gandy*, 30 Ch. D. 57. In this case a promise by a husband to pay trustees money for the support of the promisor's wife and for the education of their children was held enforceable by the wife when the trustees refused to sue. It was said that the trustees merely intervened because husband and wife could not contract. The reasoning and distinctions in this case are not clear. The promise was to pay the trustees, who were contracting parties, but the court did not clearly distinguish the case from that of a promise to pay a beneficiary directly. Cotton, L. J., suggested as an exception to the general rule forbidding one not a party to a contract to sue that "if the contract though in form it is with A is intended to secure a benefit to B so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract, then B would, in a court of equity, be allowed to insist upon and enforce the contract." In the same case it was held that the children could not sue.

<sup>3</sup> *Flynn v. Mass. Ben. Assoc.*, 152 Mass. 288.

remedy to be given the beneficiary. The original bargain was convenient and proper, and the law should find a means to enforce it according to its terms. The technical difficulty is twofold. The beneficiary is not a party to the contract, and apart from some special principle governing this class of cases cannot maintain an action. The promisee, though entitled to sue on the promise on ordinary principles of contract, having suffered no pecuniary damage by the failure of the promisor to perform his agreement, cannot recover substantial damages;<sup>1</sup> and if it be granted that the wrong of the defendant, not the injury to the plaintiff, furnishes the measure of damages, the beneficiary gains nothing thereby; for it is no easier to find a principle requiring the promisee to hold what he recovers as a trustee for the beneficiary than to find a principle allowing a direct recovery by the beneficiary against the promisor.<sup>2</sup>

There is no satisfactory solution of these difficulties in the procedure of a court administering legal remedies only. But one of the functions of equity is to provide a remedy where the common law procedure is not sufficiently elastic, and no opportunity can be found for the exercise of this function more appropriate than the sort of case under consideration. Much of the difficulty of the situation arises from the fact that three parties are interested in the contract. Common law procedure contemplates but two sides to a case, and cannot well deal with more. Equity can deal successfully with any number of conflicting interests in one case, since defendants in equity need have no community of interest.

In the case under consideration the only satisfactory relief is something in the nature of specific performance. The basis for equity jurisdiction is the same as in other cases of specific performance. There is a valid contract, and the remedy at law for its enforcement is inadequate. As the promisee and the beneficiary have both an interest in the performance of the promise, either should be allowed to bring suit joining the other as co-defendant with the promisor. In this way all parties have a chance to be heard. There may always be a possible question as to the respective rights of the promisee and the beneficiary, and this question

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<sup>1</sup> *West v. Houghton*, 4 C. P. D. 197 (But see *Lloyds v. Harper*, 16 Ch. D. 290; *Re Flavell*, 25 Ch. D. 89, 97); *Peel v. Peel*, 17 W. R. 586, *per James*, V. C.; *Burbank v. Gould*, 15 Me. 118; *Watson v. Kendall*, 20 Wend. 201; *Adams v. Union R. R. Co.*, 21 R. I. 134, 137.

<sup>2</sup> *Cleaver v. Mut. Reserve Fund Life Assoc.*, [1892] 1 Q. B. 147, 152.

should not be determined in any litigation to which either is not a party.

The right of the beneficiary in such a contract to maintain an action was suggested in a number of early English cases, but judicial opinion was almost invariably against it.<sup>1</sup> The well-known case of *Dutton v. Poole*,<sup>2</sup> it is true, allowed an action by a child on a promise made to her father, but this decision seems to have been exceptional, and indeed professes not to deny that only a party to a contract could sue upon it. The court held that the child might be so far identified with the parent on account of the nearness of relationship as to be regarded as a party to the contract. This fictitious identification of child with parent is more suited to the notions of early lawyers than to ours. The same kind of reasoning is to be found in cases on marriage settlements where it is said that the children of a marriage are "within the consideration of the marriage" and may sue upon the covenants for their benefit.<sup>3</sup> *Dutton v. Poole* has been overruled and the marriage settlement cases are generally brought within the principle of trusts. Whatever disadvantages the English law on the question may have, it has at least the merit of definiteness. A beneficiary has no legal rights;<sup>4</sup> and though the cases in equity are not all of them easy to reconcile, it seems probable that he has no equitable rights, either against the promisor or the promisee. In a recent case Lindley, L. J., said:—

"An agreement between A and B that B shall pay C gives C no right of action against B. I cannot see that there is in such a case any difference between equity and Common Law. It is a mere question of contract."<sup>5</sup>

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<sup>1</sup> See Viner's Abr. I. 333-337.

<sup>2</sup> 1 Vent. 318, s. c. T. Jones 103; 2 Lev. 210.

<sup>3</sup> See Peachey on Marriage Settlements, 56 *seq.*; Pollock on Contracts, 7th ed., 210.

<sup>4</sup> *Tweddle v. Atkinson*, 1 B. & S. 393; *Cleaver v. Mutual Reserve Fund Life Assoc.*, [1892] 1 Q. B. 147. In the latter case, Lord Esher said that apart from statute a policy of insurance on A's life payable to his wife gave her no rights. It would be payable to A's executors, and they would not hold as trustees.

So in Ireland, *McCoubrey v. Thomson*, 11 Ir. Rep. C. L. 226; *Clitheroe v. Simpson*, L. R. 4 Ir. 59; and Canada, *Faulkner v. Faulkner*, 23 Ont. 252.

A possible exception to the general rule in England arises where a devise is made subject to the condition that the devisee shall pay a sum of money to another. The acceptance of the devise was held by Lord Holt to create a personal liability to the beneficiary. *Ewer v. Jones*, 2 Ld. Ray. 937; 2 Salk. 415; 6 Mod. 26. This was followed in *Webb v. Jiggs*, 4 M. & S. 119, and not denied in *Braithwaite v. Skinner*, 5 M. & W. 313, but it was suggested that the value of the devise limited the liability of the devisee. For American cases holding the devisee liable see *post*, p. 782, n. 3.

<sup>5</sup> *Re Rotherham Alum & Chemical Co.*, 25 Ch. D. 103, 111. See also *Eley v.*

The denial of relief to a beneficiary is so obviously unsatisfactory in the case of life insurance policies that by the Married Women's Property Act in England a wife or husband or children, named as beneficiary in a policy, are entitled to the proceeds of the policy though not to sue for them directly.<sup>1</sup> But the same reasons which demand that relief shall be given in the case of an insurance policy apply to other contracts where the intention of the promisee was to stipulate for a benefit to a third person. Such bargains are unquestionably valid contracts and the law should have sufficient adaptability to enforce them according to their terms.

The case of *Tweddle v. Atkinson*,<sup>2</sup> for instance, is open to as serious criticism as the life insurance case. There the father and father-in-law of the plaintiff agreed that each should pay the plaintiff a sum of money and that he should have power to sue for it. It was held he could not recover on the promise. If the plaintiff could not recover against one who promised to pay him the money, it seems clear that he could have no more rights against the promisee if the latter collected the money from the promisor by way of damages for breach of contract.

Were it not for strained decisions on the law of trusts, the English courts would be obliged to make more unfortunate decisions than they do. In *Moore v. Darton*,<sup>3</sup> money was lent to Moore for which he gave this receipt: "Received the 22d of October, 1843, of Miss Darton, for the use of Ann Dye £100, to be paid to her at Miss Darton's decease, but the interest at 4 per cent to be paid to Miss Darton." The court held that a trust for Ann Dye had been created; but the provision as to interest is clear evidence that the transaction was a loan, which Moore promised to repay to a beneficiary instead of to the lender.

The second type of case to which reference has been made — a contract to discharge an obligation of the promisee — has been held in England enforceable only by the promisee.<sup>4</sup> This rule does not

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*Postive, etc., Life Assurance Co.*, 1 Ex. D. 88; *Melhado v. Porto Alegre Ry. Co.*, L. R. 9 C. P. 503; *Re Empress Engineering Co.*, 15 Ch. D. 125; *Gandy v. Gandy*, 30 Ch. D. 57. The remarks in *Touche v. Metropolitan Ry. Warehousing Co.*, L. R. 6 Ch. 671, must be regarded as overruled.

The Irish case of *Drimmie v. Davies*, [1899] 1 I. R. 176, however, was a clear case of a promise for the benefit of a third person, and the promise was enforced.

<sup>1</sup> 45 & 46 Vict., c. 75, §11.

<sup>2</sup> 1 B. & S. 393.

<sup>3</sup> 4 De G. & S. 517; *Ames, Cas. Trusts*, 2d ed., 39. See also *M'Fadden v. Jenkyns* 1 Phillips 153; *Ames, Cas. Trusts*, 47.

<sup>4</sup> *Crow v. Rogers*, 1 Strange 592; *Price v. Easton*, 4 B. & Ad. 433; *Re Empress*

operate as unjustly as the rule in the other type of cases, for here both the promisee and the third party have an adequate remedy. The object of such a contract must always be primarily and generally solely to secure an advantage to the promisee. He wishes to be relieved from liability, and he exacts a promise to pay the third person only because that is a way of relieving himself. If the promisor breaks his promise the promisee suffers material damage, namely the amount of the liability which should have been discharged and which in fact still exists, and according to ordinary rules of contract the promisee is liable for this damage.<sup>1</sup> The third person, moreover, can sue his original debtor. He has the right for which he bargained, and if he is given also a direct right against the promisor, the latter is subjected to a double right of action on a single promise, and the creditor is allowed to take advantage of a promise for which he did not furnish the consideration and in which the contracting parties had their own advantage, not his, in mind.

Yet the creditor is not wholly without interest in the promise to pay his claim. That promise is a valuable right belonging to his debtor. If a solvent promisor has agreed to discharge a debt of the promisee to the amount of a thousand dollars, it is as real an increase of the assets of the promisee as a promise to pay the latter directly that sum, or indeed as the actual payment thereof. It should make no difference what form a debtor's assets take. The law should be able to reach them in whatever shape they may be, and compel their application to the payment of debts. Obviously a promise to pay a debt due a third person cannot be taken on an execution against the debtor, nor is it the subject of garnishment; for the promisor, if he is willing to perform his promise, cannot be compelled to do anything else, and as the promise is not to pay the promisee, the promisor cannot be charged as garnishee or trustee for him.<sup>2</sup> The aid of equity is, therefore, necessary in order to

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Engineering Co., 16 Ch. D. 125, 129; *Bonner v. Tottenham Society*, [1899] 1 Q. B. 161. But see *Gregory v. Williams*, 3 Mer. 582.

So in Canada, *Henderson v. Killey*, 17 Ont. App. 456; s. c. *sub nom.* *Osborne v. Henderson*, 18 Can. S. C. 698; *Robertson v. Lonsdale*, 21 Ont. 600.

<sup>1</sup> See *post*, p. 795, n. 5.

<sup>2</sup> Creditors other than those specified in the promise were not allowed to garnishee the promisor in *Coleman v. Hatcher*, 77 Ala. 217; *Clinton Bank v. Studemann*, 74 Ia. 104; *Rickman v. Miller*, 39 Kan. 362; *Edgett v. Tucker*, 40 Mo. 523; *Baker v. Eglin*, 11 Oreg. 333; *Vincent v. Watson*, 18 Pa. 96; *Putney v. Farnham*, 27 Wis. 187. See also *Pounds v. Chatham*, 96 Ind. 342. Compare *Mayer v. Chattahoochee Bank*, 51 Ga. 325; *Center v. McQuesten*, 18 Kan. 476.



compel the application of such property to the creditor's claim, and acting as it does by personal decree, equity can readily give the required relief. In a bill against the indebted promisee and the promisor, the court can order the promisor to perform his promise by paying the plaintiff. As the promisee is a party to the litigation, his rights will be concluded by such a decree, and the promisor will not be subjected to the hardship of the possibility of two actions against him by virtue of a single promise.<sup>1</sup> As in the case of garnishment, the payment to the plaintiff will discharge the obligation to the promisee. Indeed the statutes permitting garnishment might readily be extended so as to cover this kind of transaction.<sup>2</sup>

One peculiarity is to be noticed in regard to the application of such a promise to the debt of the promisee. It is a right that not every creditor can take advantage of. As to most property the creditor who first attaches or files a bill acquires whatever rights his debtor has; but a promise to pay A's debt to B cannot be made available by any creditor except B, since the promisor cannot be required to do anything other than what he promised. The only right other creditors than B could have would arise if B collected his claim out of A's general assets. The liability which would then arise on the part of the promisor to A could be made available by any creditor.

If this reasoning is sound the claim of the creditor is a derivative one. His only interest in the promise is the interest which he has in any property belonging to his debtor. This view has considerable support in the decisions in many jurisdictions in regard to promises to assume mortgages.<sup>3</sup> A promise to assume and pay a mortgage for which the promisee is liable can hardly differ in principle from a promise to pay any other debt of the promisee, but the mortgage cases are frequently treated as a class by themselves. A few cases also of promises to pay unsecured debts are based on substantially this theory.<sup>4</sup>

The law in this country has not been much affected by statute. Such statutes as exist are generally of limited application. Many

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<sup>1</sup> The writer is indebted to Professor Ames for this analysis and for authorities and enlightening discussion on many points in this article.

<sup>2</sup> In Vermont garnishment by the creditor specified in the promise is allowed. *Corey v. Powers*, 18 Vt. 587; *Chapman v. Mears*, 56 Vt. 386. See also *Henry v. Murphy*, 54 Ala. 246.

<sup>3</sup> See *infra*, p. 788, 789.

<sup>4</sup> *Jesup v. Illinois Central R. R. Co.*, 43 Fed. Rep. 483, 493; *Mercantile Trust Co. v. Baltimore, etc., R. R. Co.*, 94 Fed. Rep. 722; *Congregational Soc. v. Flagg*, 72 Vt. 248; *Vanmeter's Ex. v. Vanmeters*, 3 Gratt. 148.

states make a policy of a life insurance for the benefit of a wife or a wife and children good against creditors,<sup>1</sup> but these statutes are silent as to the respective rights of the beneficiary and promisee. In Massachusetts, however, the beneficiary of a life insurance policy is given a right of action.<sup>2</sup> California,<sup>3</sup> North<sup>4</sup> and South Dakota,<sup>5</sup> and Idaho,<sup>6</sup> have the same provision that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." The Louisiana Code<sup>7</sup> allows suit by the beneficiary of a contract, and Virginia<sup>8</sup> and West Virginia<sup>9</sup> have the same provision that "if a covenant or promise be made for the sole benefit of a person with whom it is made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." The Georgia Code provides<sup>10</sup> that "if there be a valid consideration for the promise, it matters not from whom it is moved, the promisee may sustain his action though a stranger to the consideration."

The common provision in the so-called code states,<sup>11</sup> that actions shall be brought in the name of the real party in interest, is sometimes referred to as controlling the question,<sup>12</sup> but it seems to have little bearing upon it. The difficult question is whether the third person is the real party in interest. It is a question of substantive law as to the existence of rights rather than of the procedure appropriate for their enforcement. If, as matter of common law, the third person is held entitled to sue in the name of the promisee or to treat the promisee as a trustee for him, the provision would enable him to sue directly in his own name. The English common law, certainly, does not admit the indirect right any more than the direct. The provision has served in some states to add another element of confusion.

In no jurisdiction in this country is the law as strict as it is in England. But there is no uniformity in the law of the several states. That of Massachusetts probably most nearly approaches

<sup>1</sup> 3 Am. & Eng. Cyc., 2d ed., 981.

<sup>2</sup> Civ. Code, § 1559.

<sup>3</sup> Civ. Code, § 4688.

<sup>4</sup> Art. 1890; Code of Practice, Art. 35.

<sup>5</sup> Code, c. 71, § 2.

<sup>6</sup> These statutes are collected in Hepburn, *Cases on Code Pleading*, 188.

<sup>7</sup> Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340; *Smith v. Smith*, 5 Bush 625, 632; *Ellis v. Harrison*, 104 Mo. 270, 277.

<sup>8</sup> Stat. 1894, c. 225.

<sup>9</sup> Civ. Code, § 3840.

<sup>10</sup> Rev. Stat., § 3221.

<sup>11</sup> Code, § 2415.

<sup>12</sup> Code, § 2747.



the English rigor. Early decisions which followed what was then supposed to be the English law, and gave a direct right to the sole beneficiary of a contract and to a creditor against one who had promised to pay his debt, have been overruled.<sup>1</sup> But by statute, if not otherwise, the beneficiary of a life insurance policy is entitled to the proceeds of the policy as against the personal representatives of the insured,<sup>2</sup> and by a later statute<sup>3</sup> may sue the insurance company in his own name. Further, the Massachusetts court has recently held that a policy of fire insurance insuring the premises of a mortgagor and taken out and paid for by him, if made payable to the mortgagee, may be sued upon by the latter in his own name.<sup>4</sup> The mortgagee's interest in such a policy is essentially the same as any creditor's interest in a promise made to his debtor to pay the debt. It is true the promise of the insurance company is conditional and is not to pay the debt as such, but any payment made by the insurer operates as payment of the debt *pro tanto*, and, if all the parties are solvent it is the mortgagor not the mortgagee who derives benefit from the payment. The only distinction that seems possible to except this case from the general rule in regard to promises to pay a debt to a third person is to regard a policy of insurance as a mercantile instrument, the effect of which is largely determined by business custom<sup>5</sup> and which may be sued on like negotiable paper by the party to whom it is made payable without regard to who furnished the consideration or negotiated the contract. This distinction seems sound. There are also decisions in Massachusetts, not

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<sup>1</sup> Terry v. Brightman, 132 Mass. 318; Marston v. Bigelow, 150 Mass. 45; Nims v. Ford, 159 Mass. 575; Wright v. Vermont Life Ins. Co., 160 Mass. 175, overruling Felton v. Dickinson, 10 Mass. 287; Felch v. Taylor, 13 Pick. 133; Bacon v. Woodward, 12 Gray 376, 382.

<sup>2</sup> Stat. 1887, c. 214, sec. 73.

<sup>3</sup> By statute of 1894, c. 225, a beneficiary may sue in his own name upon all policies of life insurance issued since that date. A decision in regard to this statute is Wright v. Vermont Life Ins. Co., 160 Mass. 170.

<sup>4</sup> Palmer Savings Bank v. Insurance Co., 166 Mass. 189, following previous practice, which had not before been disputed. The Massachusetts court relies on the fact that most courts in the country allow the mortgagee to sue. This is true. See 11 Am. Encyc. of Pl. and Pr. 394. But such courts also allow any creditor to sue on a promise to pay him made to another.

In Michigan, where as in Massachusetts a creditor cannot sue upon a promise to pay his debt, a mortgagee cannot sue upon insurance of the mortgagor made payable to the mortgagee. Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609; Minnock v. Eureka F. & M. Ins. Co., 90 Mich. 236. Conf. Hopkins Mfg. Co. v. Aurora F. & M. Ins. Co., 48 Mich. 148.

See Langdell, Summary Contracts, §§ 49, 51.

overruled, which hold a devisee who has accepted a devise made conditional on payment to another personally liable to the beneficiary.<sup>1</sup>

A large majority of the states allow the sole beneficiary to sue at law;<sup>2</sup> but besides Massachusetts, Connecticut,<sup>3</sup> Michigan,<sup>4</sup> Minnesota,<sup>5</sup> New Hampshire,<sup>6</sup> Vermont,<sup>7</sup> Virginia,<sup>8</sup> and to some degree Pennsylvania,<sup>9</sup> do not allow an action. In Connecticut, Michigan, Vermont, and Virginia, however, it seems that a suit in equity might be maintained.<sup>10</sup> The law of New York is in rather dubious condition. It has been laid down in some cases that in order to entitle one who is not a party to a contract to sue upon it, the promisee must owe him some duty;<sup>11</sup> but from recent cases it seems that a moral duty is enough, and this gives the court consider-

<sup>1</sup> *Felch v. Taylor*, 13 Pick. 133; *Adams v. Adams*, 14 Allen 65. In *Prentice v. Brimhall*, 123 Mass. 291, 293. Gray, C. J., explained these decisions by the lack of equity powers in the court when the first decision was made. As no equitable charge on the property could have been enforced, the defendant would have escaped altogether if not held personally liable.

<sup>2</sup> See note I. at end of article.

<sup>3</sup> *Baxter v. Camp*, 71 Conn. 245. The court leaves the question open whether a suit in equity in which the representatives of the promises were joined could be maintained.

<sup>4</sup> *Wheeler v. Stewart*, 94 Mich. 445; *Linneman v. Moross*, 98 Mich. 178. The court left open the question whether there was an equitable right.

<sup>5</sup> *Jefferson v. Asch*, 53 Minn. 446; *Union Ry. Storage Co. v. McDermott*, 53 Minn. 407. In the first of these cases the court says, "Where there is nothing but the promise, no consideration from such stranger and no duty or obligation to him on the part of the promisee, he cannot sue upon it."

<sup>6</sup> *Curry v. Rogers*, 21 N. H. 247.

<sup>7</sup> *Crampton v. Ballard*, 10 Vt. 251; *Hall v. Huntoon*, 17 Vt. 244; *Fugure v. Mat. Soc. of St. Joseph*, 46 Vt. 362. But in *Hodges v. Phelps*, 65 Vt. 303, it was held that a devise subject to the payment of a legacy imposed a personal liability on the devisee, if he accepted the devise.

<sup>8</sup> *Ross v. Milne*, 12 Leigh 204. But see code of 1887, § 2415, construed in *Newberry Land Co. v. Newberry*, 95 Va. 111. In *Taliaferro v. Day*, 82 Va. 79, an accepted devise subject to a legacy was held to impose a personal liability.

<sup>9</sup> *Edmundson v. Penny*, 1 Barr. 334; *Guthrie v. Kerr*, 85 Pa. 303. See, however, *Ayer's Appeal*, 28 Pa. 179; *Merriman v. Moore*, 90 Pa. 78, 81; *Hostetter v. Hollinger*, 117 Pa. 606. If the promisor receives property as the consideration for a promise to make a payment, though the promisor is under no obligation to use the property received or its proceeds for the purpose, the Pennsylvania court apparently by an unwarranted extension of the law of trusts holds the promisor liable.

<sup>10</sup> See cases in preceding notes.

<sup>11</sup> *Vrooman v. Turner*, 69 N. Y. 280, 283; *Beveridge v. N. Y. Elevated R. R.*, 112 N. Y. 1, 26; *Lorillard v. Clyde*, 122 N. Y. 498; *Townsend v. Rackham*, 143 N. Y. 516; *Sullivan v. Sullivan*, 161 N. Y. 554; *Coleman v. Hiler*, 85 Hun 547. See also *Glens Falls Gas Light Co. v. Van Vranken*, 11 N. Y. App. Div. 420; *Opper v. Hirsch*, 68 N. Y. Supp. 879. Compare the cases of *Little v. Banks*, 85 N. Y. 281, and *Todd v. Weber*, 95 N. Y. 181.

able latitude.<sup>1</sup> Minnesota has adopted the same distinction.<sup>2</sup> Missouri also has held some duty necessary and a moral duty sufficient,<sup>3</sup> but the latest decision inconsistently dispenses with the requirement.<sup>4</sup> A suggestion of the sort is occasionally found in other states.<sup>5</sup> The supposed necessity results from a confusion of the two distinct types of cases. The early New York cases bearing on the right of a creditor to sue one who promises the debtor to pay the debt recognized that the creditor's right was derivative and that it was by virtue of his claim against the debtor that he acquired a right to sue upon the promise to the debtor. But the requirement of a debt or duty is wholly inapplicable to contracts for the sole benefit of a third person. It might equally well be said that a gift should be invalid unless the donor was under a duty to make it. Moreover, whenever such a requirement is proper a moral obligation cannot suffice. When an obligation is of such a character that the obligee cannot enforce it directly against the obligor, it can no more furnish the basis for a right against one who has promised the obligor to pay the debt, than it could for the garnishment of a debt due to the obligor. In the first case cited as illustrating the New York rule it was true not only that the promisee was under no duty to the plaintiff, but also that the plaintiff was not intended by the promisee as the beneficiary of the contract. The benefit expected to result to the plaintiff was merely incidental to the general object of the contract. This was sufficient ground for the decision; but in the later cases where the doctrine was applied the result was needlessly to defeat an intended gift.

There are several recurring situations which illustrate the contract for the sole benefit of a third person. The commonest is the case already referred to of a life insurance policy for the benefit of another. This case may well be regarded as depending upon the nature of a policy of insurance as a mercantile instrument. At all events the insurance decisions form a class by themselves, and but little reference is made in them to the general law of con-

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<sup>1</sup> *Buchanan v. Tilden*, 158 N. Y. 109; *Knowles v. Erwin*, 43 Hun 150, *affd.* 124 N. Y. 633; *Whitcomb v. Whitcomb*, 92 Hun 443; *Babcock v. Chase*, 92 Hun 264; *Luce v. Gray*, 92 Hun 599. In all these cases the promise was to pay money to a dependent relative.

<sup>2</sup> See cases, p. 780, n. 5.

<sup>3</sup> *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118; *Howsmon v. Trenton Water Co.*, 119 Mo. 304; *St. Louis v. Von Phul*, 133 Mo. 561; *Devers v. Howard*, 144 Mo. 671; *Glencoe Lime Co. v. Wind*, 86 Mo. App. 163.

<sup>4</sup> *Crone v. Stinde*, 156 Mo. 262.

<sup>5</sup> *Sample v. Hale*, 34 Neb. 220; *Lyman v. Lincoln*, 38 Neb. 794.

tracts. Presumably everywhere the beneficiary is given a right to enforce such a policy, and generally by a direct action. This result has been reached in England and Massachusetts by statute, but in most states without the aid of statute.<sup>1</sup>

Another common illustration arises on these or similar facts: A parent gives property to a son, who upon receiving it promises to make specified payments to daughters or others either at once or upon the death of the donor. There is properly no trust or even equitable charge, because it is contemplated that the son shall deal as he sees fit with the property transferred to him and pay the beneficiaries from any source he chooses. Courts are rightly almost universally unwilling to deny the beneficiaries a remedy in such a case.<sup>2</sup> Even in England there are cases that have never been overruled, in which a beneficiary was allowed to recover in an action of debt against a devisee whose devise was left upon the condition that he should make a payment to the beneficiary. If the devisee accepts the gift he is personally liable to perform the duty which he thereby assumes, and his liability is not restricted to the value of the property he has received.<sup>3</sup> So far as this question of

<sup>1</sup> 45 & 46 Vict. c. 75, § 11; Mass. Stats. 1887, c. 214, § 73; 1894, c. 225. (See *Cleaver v. Mut. Reserve Fund Life Assoc.*, [1892] 1 Q. B. 147; *Nims v. Ford*, 159 Mass. 575; *Wright v. Vermont Life Ins. Co.*, 160 Mass. 170.) Numerous authorities in other jurisdictions are collected in 3 Am. & Eng. Cyc. 980.

<sup>2</sup> *Beals v. Beals*, 20 Ind. 163; *Henderson v. McDonald*, 84 Ind. 149; *Waterman v. Morgan*, 114 Ind. 237; *Stevens v. Flannagan*, 131 Ind. 122; *Weinreich v. Weinreich*, 18 Mo. App. 364; *Knowles v. Erwin*, 43 Hun 150; 124 N. Y. 633; *Luce v. Gray*, 92 Hun 599; *Thompson v. Gordon*, 3 Strobb. 196. See also *Lawrence v. Oglesby*, 178 Ill. 122.

*Contra* are *Townsend v. Rackham*, 143 N. Y. 516; *Coleman v. Hiler*, 85 Hun 547 (the promisee in these cases was under no moral duty to the beneficiaries); *Guthrie v. Kerr*, 85 Pa. 303 (*conf.* *Hostetter v. Hollinger*, 117 Pa. 606). Relief in an action at law was also denied in *Baxter v. Camp*, 71 Conn. 245, and *Linneman v. Moross*, 98 Mich. 178; but it was suggested that the plaintiff might have a remedy in equity.

<sup>3</sup> *Ewer v. Jones*, 2 Ld. Ray. 937; 2 Salk. 415; 6 Mod. 26; *Webb v. Jiggs*, 4 M. & S. 119; *Braithwaite v. Skinner*, 5 M. & W. 313. In the last case it was said by some of the judges that the plaintiff's recovery would be restricted to the value of the land.

In this country the devisee is personally liable without restriction. *Harland v. Person*, 93 Ala. 273; *Williams v. Nichol*, 47 Ark. 254; *Millington v. Hill*, 47 Ark. 301; *Lord v. Lord*, 22 Conn. 595; *Olmstead v. Brush*, 27 Conn. 530; *Zimmer v. Sennott*, 134 Ill. 505; *Porter v. Jackson*, 95 Ind. 210; *Owing's Case*, 1 Bland 370; *Felch v. Taylor*, 13 Pick. 133; *Bacon v. Woodward*, 12 Gray 376, 382; *Adams v. Adams*, 14 Allen 65; *Prentice v. Brimhall*, 123 Mass. 291, 293; *Smith v. Jewett*, 40 N. H. 530, 535; *Wiggin v. Wiggin*, 43 N. H. 561; *Glen v. Fisher*, 6 Johns. Ch. 33; *Gridley v. Gridley*, 24 N. Y. 130; *Loder v. Hatfield*, 71 N. Y. 92; *Brown v. Knapp*, 79 N. Y. 136; *Yearly v. Long*, 40 Ohio St. 27; *Flickinger v. Saum*, 40 Ohio St. 591; *Hoover v. Hoover*, 5 Pa. 351; *Etter v. Greenwalt*, 98 Pa. 422; *Dreer v. Pennsylvania Co.*,

personal liability is concerned these cases present quite as much difficulty in principle as the cases where the gift is made *inter vivos*.

In most jurisdictions no distinction is made when the promise is based on valid consideration other than a transfer of property; for instance, services or forbearance of a claim.<sup>1</sup>

It is a common stipulation in a building contract that the contractor will pay all bills for labor and materials. In most cases the fulfilment of this promise by the contractor operates to discharge a liability of the owner of the building, whose building would be liable to satisfy the liens given by the law to workmen and materialmen. It cannot, therefore, be inferred that the promisee requires the promise in order to benefit such creditors of the contractor. The natural inference is that his object is to protect himself or his building. When, however, the owner of the building is a municipality, or county, or state, such an inference cannot so readily be justified, for the laws give no liens against the buildings of such owners. In such cases if the stipulation can be regarded as the result of more than the accidental insertion of a provision common in building contracts without reflection as to its necessity, it must be supposed that the object was to benefit creditors of the contractor. This supposition becomes a certainty when the legislature in view of litigation in the courts in regard to the matter enacts that all building contracts made by towns or counties shall contain such a stipulation. Creditors have in some states been allowed not only to take advantage of the promise but to sue the contractor and his sureties upon a bond given by him to secure the performance of his contract.<sup>2</sup>

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108 Pa. 26; *Jordan v. Donahue*, 12 R. I. 199; *Hodges v. Phelps*, 65 Vt. 303; *Taliaferro v. Day*, 82 Va. 79.

<sup>1</sup> *Allen v. Davison*, 16 Ind. 416; *Marcett v. Wilson*, 30 Ind. 240; *Strong v. Marcy*, 33 Kan. 109; *Clarke v. McFarland's Exec.*, 5 Dana 45; *Benge v. Hiatt's Adm.*, 82 Ky. 666; *Felton v. Dickinson*, 10 Mass. 287 (overruled by *Marston v. Bigelow*, 150 Mass. 45); *Todd v. Weber*, 95 N. Y. 181; *Buchanan v. Tilden*, 158 N. Y. 109; *Whitcomb v. Whitcomb*, 92 Hun 443; *Babcock v. Chase*, 92 Hun 264.

See also *Lawrence v. Oglesby*, 178 Ill. 122.

But in Pennsylvania, though the promise is perhaps enforceable by the beneficiary when the consideration is the transfer of property, it is not if the consideration is anything else. *Edmundson v. Penny*, 1 Barr 334. See also *Washburn v. Interstate Investment Co.*, 26 Oreg. 436.

<sup>2</sup> *Baker v. Bryan*, 64 Ia. 561 (but see *Hunt v. King*, 97 Ia. 88); *St. Louis v. Von Phul*, 133 Mo. 561 (overruling *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218); *Devers v. Howard*, 144 Mo. 671; *Glencoe Lime Co. v. Wind*, 86 Mo. App. 163; *Sample v. Hale*, 34 Neb. 220; *Lyman v. Lincoln*, 38 Neb. 794; *Doll v. Crume*, 41 Neb. 655; *Korsmeyer Co. v. McClay*, 43 Neb. 649; *Kaufmann v. Cooper*, 46 Neb. 644;

A somewhat similar case arises where a water company contracts to furnish water sufficient to supply the hydrants of a town or district, and the failure of the water company to keep its promise to the town results in the destruction of a building by a fire which might have been extinguished but for the lack of water. The owner of the house is not generally allowed to sue on such a promise. Though the town or district which is the promisee, not being itself liable for the lack of water or for the destruction of the building, has no pecuniary interest in the performance of the promise, yet it may be doubted whether the stipulation was exacted for the benefit of such people as might have their buildings destroyed from lack of water. It is a more reasonable construction that the object of the promise is to benefit the community as a whole. Whatever may be the reason, the plaintiff is not usually allowed to recover in such cases.<sup>1</sup>

A telegraph company's contract made with the sender of a telegram to deliver it to the person addressed is sometimes treated as a contract made for the sole benefit of the latter, who is allowed to sue for this reason.<sup>2</sup> In some cases this construction is fair enough, but senders of telegrams perhaps more frequently are seeking objects of their own rather than the benefit of another.

One of the numerous ways of making out a fictitious considera-

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Hickman *v.* Loyal, 47 Neb. 816; King *v.* Murphy, 49 Neb. 670; Rohman *v.* Gaiser, 53 Neb. 474; Pickle Marble Co. *v.* McClay, 54 Neb. 661. *Contra*, Jefferson *v.* Asch, 53 Minn. 446; Union Ry. Storage Co. *v.* McDermott, 53 Minn. 407; Buffalo Cement Co. *v.* McNaughton, 90 Hun 74; 156 N. Y. 702; 157 N. Y. 703; Parker *v.* Jeffery, 26 Oreg. 186; Brower Lumber Co. *v.* Miller, 28 Oreg. 565. See also Montgomery *v.* Rief, 15 Utah 495.

An action on the bond presents the difficulty that the plaintiffs not only are not the promisees, but are not the payees. The promise is to pay the penalty of the bond, not to the creditors, but to the town or county. This difficulty is not much alluded to in the cases. See, however, Jefferson *v.* Asch, and Buffalo Cement Co. *v.* McNaughton, *supra*.

<sup>1</sup> Boston Safe Deposit Co. *v.* Salem Water Co., 94 Fed. Rep. 240; Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24; Fowler *v.* Water Co., 83 Ga. 219; Davis *v.* Water Works, 54 Ia. 59; Becker *v.* Keokuk Water Works, 79 Ia. 419; Phoenix Ins. Co. *v.* Trenton Water Co., 42 Mo. App. 118; Howsmon *v.* Trenton Water Co., 119 Mo. 304; Eaton *v.* Fairbury Water Works, 37 Neb. 546; Ferris *v.* Carson Water Co., 16 Nev. 44; Wainwright *v.* Queens County Water Co., 78 Hun 146; 3 Lea 45. *Contra*, Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340.

<sup>2</sup> Western Union Tel. Co. *v.* Hope, 11 Ill. App. 291 (but see Western Union Tel. Co. *v.* Dubois, 128 Ill. 248); Western Union Tel. Co. *v.* Fenton, 52 Ind. 3 (statutory); Markel *v.* Western Union Tel. Co., 19 Mo. App. 80 (statutory); Aiken *v.* Western Union Tel. Co., 5 S. C. 371; Western Union Tel. Co. *v.* Jones, 81 Tex. 271. The cases allowing a right of action, based on various reasons, are collected in Joyce on Electric Law, § 1008.



tion for charitable subscriptions is to regard the promises of the subscribers as mutual promises to pay the beneficiary, who is then allowed to sue as on a contract made for its benefit.<sup>1</sup> In fact, in such subscriptions the promise, on a fair construction, almost always runs directly to the beneficiary or to trustees representing it.

In a recent New Jersey case<sup>2</sup> the beneficiary was undetermined when the contract was made. The defendant contracted to pay \$750 to the owner of the foal by the defendant's stallion that first trotted a mile in 2.30. The plaintiff who answered the description was allowed to sue on the contract though not a party to it.

A decision in Indiana<sup>3</sup> presents the rather unusual case of the enforcement by injunction of a promise for the benefit of a third person. The defendant as lessee of certain premises had covenanted with the lessor to sell on the premises no beer except that manufactured by the plaintiff company. The lessor was a relative of stockholders in the company, but had no pecuniary interest in the matter. The company was granted an injunction to enforce the covenant.<sup>4</sup>

It is in regard to contracts to discharge a debt of the promisee that the greatest confusion prevails. In the first place the intrinsic difficulty of the case is greater than where the third person is the sole beneficiary of the contract. Trust, agency, novation, must here be carefully distinguished, and the facts may not clearly indicate in which class a particular case belongs, since the parties may not have sufficiently expressed any intention. Further, it is in this class of cases that the reasoning of the courts is most artificial. New York by the decision of *Lawrence v. Fox*<sup>5</sup> has done more than any other jurisdictions to spread and strengthen the theory that a third person can sue on such a contract. In a later case<sup>6</sup> the New York court said :—

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<sup>1</sup> *Rogers v. Galloway Female College*, 64 Ark. 627; *Wilson v. First Presbyterian Church*, 56 Ga. 554; *Irwin v. Lombard University*, 56 Ohio St. 9, 20. See also *Hale v. Ripp*, 32 Neb. 259; *Roberts v. Cobb*, 31 Hun 150; *Parsons, Contracts*, 8th ed., 468 *seq.* *Contra* is *Curry v. Rogers*, 21 N. H. 247. A curious case where the promises actually were by the subscribers to each other is *New Orleans St. Joseph's Assoc. v. Magnier*, 16 La. Ann. 338. A number of hatters agreed to close their shops on Sunday. For any breach it was agreed that the offender should pay the plaintiff \$100. The plaintiff was not allowed to recover because its benefit was not the object of the contract.

<sup>2</sup> *Whitehead v. Burgess*, 61 N. J. L. 75.

<sup>3</sup> *Ferris v. American Brewing Co.*, 155 Ind. 539.

<sup>4</sup> And in *Chicago, etc., R. R. v. Bell*, 44 Neb. 44, an agreement not to sue a third person was effectively used as a bar to an action against the latter. See also *Ayer's Appeal*, 28 Pa. 179.

<sup>5</sup> 20 N. Y. 268

<sup>6</sup> *Simson v. Brown*, 68 N. Y. 355, 361.

"It is not every promise made by one to another from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract, nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

This language or similar language is adopted in other cases.<sup>1</sup> Do the courts which use it really believe that the intent of the promisee in such a case as *Lawrence v. Fox* is to benefit the third party? When a grantor of premises subject to a mortgage requires the grantee to assume and agree to pay the mortgage, is it the welfare of the mortgagee that the grantor is considering, or is it his own? Whatever may be the answer to these questions, the jurisdictions are few which do not allow the creditor a direct action at law against the promisor. Connecticut,<sup>2</sup> Massachusetts,<sup>3</sup> Michigan,<sup>4</sup> and North Carolina<sup>5</sup> are absolutely committed against the doctrine. The United States Supreme Court,<sup>6</sup> Maryland,<sup>7</sup> New Hampshire,<sup>8</sup>

<sup>1</sup> *Central Trust Co. v. Berwind-White Co.*, 95 Fed. Rep. 391; *Thomas Mfg. Co. v. Prather*, 65 Ark. 27; *Hall v. Alford*, 49 S. W. Rep. 444 (Ky.); *Jefferson v. Asch*, 53 Minn. 446; *State v. St. Louis, etc., R. R.*, 125 Mo. 596, 617; *Garnsey v. Rogers*, 47 N. Y. 233; *Vrooman v. Turner*, 69 N. Y. 280, 283; *Beveridge v. N. Y. Elevated R. R.*, 112 N. Y. 1, 26; *Parker v. Jeffery*, 26 Oreg. 186, 188.

<sup>2</sup> *Morgan v. Randolph-Clowes Co.*, 73 Conn. 396. See also *Baxter v. Camp*, 71 Conn. 245. These cases overrule earlier decisions, *e. g.* *Crocker v. Higgins*, 7 Conn. 342; *Steene v. Aylesworth*, 18 Conn. 244, 252.

<sup>3</sup> *Mellen v. Whipple*, 1 Gray 317; *Flint v. Pierce*, 99 Mass. 68; *Exchange Bank v. Rice*, 107 Mass. 37; *Rogers v. Union Stone Co.*, 130 Mass. 581; *Aigen v. Boston & Maine R. R.*, 132 Mass. 423; *Morrill v. Allen*, 136 Mass. 93; *Borden v. Boardman*, 157 Mass. 410; *White v. Mt. Pleasant Mills*, 172 Mass. 462. See also cases of mortgage, *post*, p. 787, n. 7.

<sup>4</sup> *Pipp v. Reynolds*, 20 Mich. 88; *Turner v. McCarty*, 22 Mich. 265; *Halsted v. Francis*, 31 Mich. 113; *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Hicks v. McGarry*, 38 Mich. 667; *Hunt v. Strew*, 39 Mich. 368, 371; *Booth v. Conn. Mut. Life Ins. Co.*, 43 Mich. 299; *Ayres v. Gallup*, 44 Mich. 13; *Edwards v. Clements*, 81 Mich. 513; *Minnock v. Eureka F. & M. Ins. Co.*, 90 Mich. 236; *Bliss v. Plummer's Extr.*, 103 Mich. 181.

<sup>5</sup> *Morehead v. Wriston*, 73 N. C. 398; *Peacock v. Williams*, 98 N. C. 324; *Woodcock v. Bostic*, 118 N. C. 822.

<sup>6</sup> *National Bank v. Grand Lodge*, 98 U. S. 123. See also *Constable v. National S. S. Co.*, 154 U. S. 51; *Johns v. Wilson*, 180 U. S. 440; *Nebraska Bank v. Nebraska Hydraulic Co.*, 14 Fed. Rep. 763; *Jesup v. Illinois Central Co.*, 43 Fed. Rep. 483, 493; *Hennessy v. Bond*, 77 Fed. Rep. 405; *Mercantile Trust Co. v. Baltimore & Ohio Co.*, 94 Fed. Rep. 722.

<sup>7</sup> *Hand v. Evans Marble Co.*, 88 Md. 226. But see *Small v. Schaefer*, 24 Md. 143; *Seigman v. Hoffacker*, 57 Md. 321.

<sup>8</sup> *Warren v. Batchelder*, 15 N. H. 133. *Conf.* *Warren v. Batchelder*, 16 N. H. 580; *Lang v. Henry*, 54 N. H. 57; *Hunt v. New Hampshire Fire Assoc.*, 68 N. H. 305, 308. In the case last cited the court say, "The debt is in equity his debt." "If for



Pennsylvania,<sup>1</sup> and Wyoming,<sup>2</sup> at least, do not accept it unequivocally. A few other jurisdictions apart from local statutes or codes of procedure would hold the creditors' only right to be derivative and in equity.<sup>3</sup>

The most universal illustration of the right of the creditor to sue is where the grantee of premises subject to a mortgage assumes and agrees to pay the mortgage. In England,<sup>4</sup> Ireland,<sup>5</sup> and Canada<sup>6</sup> this gives the mortgagee no right. But the only state in this country where it has definitely been decided that the mortgagee cannot proceed against the grantee is Massachusetts.<sup>7</sup> Of the other jurisdictions which do not accept the doctrine of

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technical reasons the law is powerless to enforce the duty, equity is subject to no such weakness."

<sup>1</sup> *Blymire v. Boistle*, 6 Watts 182; *Ramsdale v. Horton*, 3 Barr 330; *Campbell v. Lacock*, 40 Pa. 450; *Robertson v. Reed*, 47 Pa. 115; *Torrens v. Campbell*, 74 Pa. 470; *Kountz v. Holthouse*, 85 Pa. 235, 237; *Adams v. Kuehn*, 119 Pa. 76; *Freeman v. Pennsylvania R. R. Co.*, 173 Pa. 274. But see *Strohecker v. Grant*, 16 S. & R. 237, 241; *Hind v. Holdship*, 2 Watts 104; *Commercial Bank v. Wood*, 7 W. & S. 89; *Vincent v. Watson*, 18 Pa. 96; *Bellas v. Fagely*, 19 Pa. 273; *Townsend v. Long*, 77 Pa. 143; *White v. Thielens*, 106 Pa. 173; *Delp v. Brewing Co.*, 123 Pa. 42. See also mortgage cases, *post*, p. 809.

The rule in Pennsylvania seems to be that in general the creditor cannot sue, but "among the exceptions are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose, also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor." *Adams v. Kuehn*, 119 Pa. 76, 86. The first exception thus stated is that of a trust, but in its application of the rule the Pennsylvania court has gone beyond trusts properly so called.

<sup>2</sup> *McCarteney v. Wyoming Nat. Bank*, 1 Wyo. 382.

<sup>3</sup> The early Indiana law allowed a remedy in equity only. *Bird v. Lanius*, 7 Ind. 615; and since the code has made legal and equitable procedure the same, it has still been recognized that the creditor's right is equitable. *Davis v. Calloway*, 30 Ind. 112; *Hendricks v. Frank*, 86 Ind. 278, 284. Aside from statute it is probable that in Virginia and West Virginia the creditor would be allowed only an equitable right.

<sup>4</sup> *Tweddell v. Tweddell*, 2 Bro. Ch. 152; *Oxford v. Rodney*, 14 Ves. 417; *Barham v. Thanet*, 3 M. & R. 607; *Re Errington*, [1894] 1 Q. B. 11; *Bonner v. Tottenham Society*, [1899] 1 Q. B. 161.

<sup>5</sup> *Barry v. Harding*, 1 Jones & Lat. 475, 485.

<sup>6</sup> *Aldous v. Hicks*, 21 Ont. 95; *Frontenac Loan Co. v. Hysop*, 21 Ont. 577. See also *Williams v. Balfour*, 18 Can. S. C. 472. *Re Cozier*, 24 Grant 537, *contra*, is overruled.

<sup>7</sup> *Mellen v. Whipple*, 1 Gray 317; *Pettee v. Peppard*, 120 Mass. 522, 523; *Prentice v. Brimhall*, 123 Mass. 291; *Coffin v. Adams*, 131 Mass. 133; *Rice v. Sanders*, 152 Mass. 108; *Creesy v. Willis*, 159 Mass. 249. No attempt seems to have been made in Massachusetts to enforce the mortgagee's claim by a bill in equity against the mortgagor and his grantee. Apparently it is assumed that no relief would be granted. In *Rice v. Sanders* it is said that the grantee's promise "gave no additional rights to the mortgagee."

Lawrence *v.* Fox, Connecticut<sup>1</sup> and Michigan<sup>2</sup> have statutes which cover the case; the United States Supreme Court<sup>3</sup> and North Carolina<sup>4</sup> give equitable relief on substantially the principles herein advocated; and if the attitude of the Maryland and Pennsylvania courts towards this class of cases is inconsistent with their general rule, they are not deterred on that account from giving the mortgagee relief. It is a curious circumstance that though a promise by a third person to pay a mortgage debt cannot be distinguished in principle from a promise to pay any other debt, the question has been to some extent separately dealt with. Perhaps, because the subject of mortgages fell within the scope of equity jurisdiction, the attempt was early made by mortgagees to sue in equity those who had assumed an obligation to pay the mortgage, while no such attempt was made with other debts. The earlier cases were in New York, and the result of them is thus summarized in a later decision which first extended the mortgagee's right to a direct action at law.

"If the plaintiff had sought to foreclose the mortgages in question and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendant parties, the authorities would be abundant to sustain the action in both aspects."<sup>5</sup>

The earlier New York doctrine has had considerable following in other jurisdictions. Alabama,<sup>6</sup> California,<sup>7</sup> Connecticut,<sup>8</sup> Indi-

<sup>1</sup> Gen. Stat., § 983; *Morgan v. Randolph-Clowes Co.*, 73 Conn. 396, 398.

<sup>2</sup> Comp. Laws 1897, § 519; *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Taylor v. Whitmore*, 35 Mich. 97; *Carley v. Fox*, 38 Mich. 387; *Winans v. Wilkie*, 41 Mich. 264; *Unger v. Smith*, 44 Mich. 22; *Corning v. Barton*, 102 Mich. 86; *Jehle v. Brooks*, 112 Mich. 131; *Terry v. Durand Land Co.*, 112 Mich. 665. It is essential that the grantee and the mortgaged land be within the jurisdiction. *Booth v. Connecticut Mut. Life Ins. Co.*, 43 Mich. 299.

<sup>3</sup> See p. 789, n. 8.

<sup>4</sup> See p. 789, n. 4.

<sup>5</sup> *Burr v. Beers*, 24 N. Y. 178, *per* Denio, J., citing *Curtis v. Tyler*, 9 Paige 432; *Halsey v. Reed*, 9 Paige 446; *March v. Pike*, 10 Paige 595; *King v. Whitely*, 10 Paige 465; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Vail v. Foster*, 4 N. Y. 312; *Trotter v. Hughes*, 12 N. Y. 74; *Belmont v. Coman*, 22 N. Y. 438. See also *Wager v. Link*, 150 N. Y. 549.

<sup>6</sup> *Young v. Hawkins*, 74 Ala. 370.

<sup>7</sup> *Williams v. Naftzger*, 103 Cal. 438; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547; *Tulare County Bank v. Madden*, 109 Cal. 312; *Hopkins v. Warner*, 109 Cal. 133. In California by statute an independent action cannot be maintained even against the mortgagor on a debt secured by mortgage. Code Civ. Proc., § 720. The mortgaged property must first be exhausted. *Stockton Saving & Loan Soc. v. Harold*, 127 Cal. 612, 617.

<sup>8</sup> *Bassett v. Bradley*, 48 Conn. 224. See also Gen. Stat., § 983; *Morgan v. Randolph-Clowes Co.*, 73 Conn. 396, 398.

ana,<sup>1</sup> Maryland,<sup>2</sup> Michigan,<sup>3</sup> New Jersey,<sup>4</sup> North Carolina,<sup>5</sup> North Dakota,<sup>6</sup> Vermont,<sup>7</sup> Virginia,<sup>8</sup> and the United States Supreme Court<sup>9</sup> have adopted it. The phrase commonly used is that the mortgagee is "subrogated" to the rights of the mortgagor, who is the promisee. The use of the word subrogation is not wholly fortunate. It suggests analogies which do not exist, with the position of a surety who has paid the debt. In fact, it is merely the application by a court of equity of property of a debtor, the mortgagor, to the payment of the debt; and whatever terminology is used there is no doubt that this is substantially the meaning of the courts which have followed the early New York decisions.

Even courts which derive the right of the mortgagee to sue the grantee from his right to enforce the mortgagor's rights, too frequently allow the suit to be maintained without joinder of the mortgagor. The essential reason why the proceeding should be in equity is because the mortgagor ought to be joined, since it is his property—that is, a promise to him—of which the plaintiff is seeking to avail himself, and that property should not be taken without giving the owner his day in court. Moreover, it is unfair to the grantee to charge him at the suit of the mortgagee unless at the same time all claim against him on the part of the mortgagor is extinguished. This cannot be judicially determined unless the mortgagor is joined.<sup>10</sup>

It frequently happens that several grantees successively buy the

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<sup>1</sup> See cases cited, p. 808, n. III.

<sup>2</sup> *George v. Andrews*, 60 Md. 26; *Chilton v. Brooks*, 72 Md. 554; *Stokes v. Detrick*, 75 Md. 256.

<sup>3</sup> *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; and see *supra*, p. 788, n. 2.

<sup>4</sup> *Klapworth v. Dressler*, 13 N. J. Eq. 62; *Pruder v. Williams*, 26 N. J. Eq. 210; *Crowell v. Currier*, 27 N. J. Eq. 152, 650; *Wise v. Fuller*, 29 N. J. Eq. 257; *Green v. Stone*, 54 N. J. Eq. 387; *Whittaker v. Belvidere Co.*, 55 N. J. Eq. 674, 688.

<sup>5</sup> *Woodcock v. Bostic*, 118 N. C. 822.

<sup>6</sup> *Moore v. Booker*, 4 N. Dak. 543.

<sup>7</sup> *Davis v. Hulett*, 58 Vt. 90; *Hodges v. Phelps*, 65 Vt. 303.

<sup>8</sup> *Willard v. Worsham*, 76 Va. 392; *Osborne v. Cabell*, 77 Va. 462; *Francisco v. Shelton*, 85 Va. 779; *Fisher v. White*, 94 Va. 370; *Ellett v. McGhee*, 94 Va. 377.

<sup>9</sup> *Keller v. Ashford*, 133 U. S. 610; *Willard v. Wood*, 135 U. S. 309, 314. See also *Winters v. Hub Mining Co.*, 57 Fed. Rep. 287. But in a case arising under the Arizona Code, which assimilates legal and equitable procedure, a direct action was allowed against the grantee in *Johns v. Wilson*, 180 U. S. 440.

<sup>10</sup> In *Keller v. Ashford*, 133 U. S. 610, 626, the court noticed the question and disposed of it thus: "Although the mortgagor might properly have been made a party to this bill, yet as no objection was taken on that ground at the hearing, and the omission to make him a party cannot prejudice any interest of his, or any right of either party to this suit, it affords no ground for refusing relief." See also *Miller v. Thompson*, 34 Mich. 10; *Pruden v. Williams*, 26 N. J. Eq. 210.

premises and assume payment of the mortgage. It is rightly held that the last grantee can be charged as well as the immediate grantee of the mortgagor. The same reasoning which justifies charging the first grantee through his obligation to the mortgagee's debtor requires the application of the obligation of the second grantee to the first grantee in order to satisfy the obligation of the latter to the mortgagor, and so on.<sup>1</sup>

Moreover, all who have assumed the mortgage may be charged though they have parted with the premises.<sup>2</sup> They have made a valid contract to pay the mortgage, which they cannot abrogate by selling the premises, though they may get such protection as the promise of their grantee to assume the mortgage can give. As between the grantor and grantee, the latter becomes principal debtor and the former a surety. Accordingly, if the mortgagee gives time to the grantee, he forfeits his right to assert a claim against the grantor.<sup>3</sup> The doctrine would be more exactly expressed if it were said that the mortgagee forfeited his right to collect his claim against the mortgagor out of any property other than the promise of the grantee.

A curious situation arises when a mortgagor transfers the premises to one who, though taking them subject to the mortgage,

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<sup>1</sup> See *e. g.* *Flint v. Cadenasso*, 64 Cal. 83; *Ingram v. Ingram*, 71 Ill. App. 497, 172 Ill. 287; *Rick v. Hoffman*, 69 Ind. 137; *Carnahan v. Tousey*, 93 Ind. 561; *Corning v. Burton*, 102 Mich. 86; *Gifford v. Corrigan*, 117 N. Y. 257.

<sup>2</sup> *Ingram v. Ingram*, 71 Ill. App. 497, 172 Ill. 287; *Carnahan v. Tousey*, 93 Ind. 561; *Corning v. Burton*, 102 Mich. 86.

<sup>3</sup> *Union Life Ins. Co. v. Hanford*, 143 U. S. 187; *Union Stove Work v. Caswell*, 48 Kas. 689; *George v. Andrews*, 60 Md. 26; *Chilton v. Brooks*, 72 Md. 554; *Metz v. Todd*, 36 Mich. 473; *Dedrick v. Blyker*, 85 Mich. 475; *Commercial Bank v. Wood*, 56 Mo. App. 214; *Wayman v. Jones*, 58 Mo. App. 313; *Nelson v. Brown*, 140 Mo. 580; *Merriam v. Miles*, 54 Neb. 566; *Calvo v. Davies*, 73 N. Y. 211; *Paine v. Jones*, 14 Hun 577; *Jester v. Sterling*, 25 Hun 344; *Fish v. Hayward*, 28 Hun 456; *Dillaway v. Peterson*, 11 S. Dak. 210; *Miller v. Kennedy*, 12 S. Dak. 478; *Hull v. Hayward*, 13 S. Dak. 291; *Schroeder v. Kinney*, 15 Utah 462. See also *Hodges v. Elyton Co.*, 109 Ala. 617; *Home Nat. Bank v. Waterman's Est.*, 134 Ill. 461. *Contra*, *Shepherd v. May*, 115 U. S. 505; *Keller v. Ashford*, 133 U. S. 610, 625 (but see *Union Ins. Co. v. Hanford*, 143 U. S. 187); *Corbett v. Waterman*, 11 Ia. 86; *James v. Day*, 37 Ia. 164; *Connecticut Mut. Life Ins. Co. v. Mayer*, 8 Mo. App. 18 (overruled); see also *Ridgley v. Robertson*, 67 Mo. App. 45; *Aldous v. Hicks*, 21 Ont. 95. Similarly if a grantee who takes subject to a mortgage, but does not assume payment of it, is given time, the mortgagor is discharged to the extent of the value of the mortgaged property which is the principal debtor. *Travers v. Dorr*, 60 Minn. 173; *Murray v. Marshall*, 94 N. Y. 611; *Antisdel v. Williamson*, 165 N. Y. 372, 375; *Bunnell v. Carter*, 14 Utah 100. But see *contra*, *Chilton v. Brooks*, 72 Md. 554; and the decisions cited above which hold that the mortgagor is not discharged even where the grantee has assumed payment of the mortgage.

does not agree to pay it, and this grantee thereafter transfers the premises to another who by the deed assumes and agrees to pay the mortgage. The promisee has no interest in the performance of this promise, since he is not personally liable for the debt, and he is no longer the owner of the premises. The only intelligent object that can be suggested for requiring the promise from the grantee is a wish to benefit the mortgagee. In that view the case would fall within the first type of promises for the benefit of a third person and the mortgagee would be the sole beneficiary. But it is hard to suppose that the promisee had any such intention. The object in fact of such a stipulation, if its insertion is not altogether a mistake, is doubtless to guard against a supposed or possible liability on the part of the promisee. The decisions which generally deny the mortgagee a right to recover in such a case, therefore, seem sound.<sup>1</sup>

Another peculiar situation arises where a mortgagor makes a second mortgage and the second mortgagee agrees to pay off the first mortgage. Subsequently the first mortgagee endeavors to take advantage of this promise. He is denied the right and justly. In the ordinary case where a purchaser assumes and agrees to pay a mortgage he has received a *quid pro quo* for the amount of the mortgage. He owes the amount of the mortgage to some one. In the case under consideration, however, the second mortgagee does not owe the amount of the first mortgage. He has agreed virtually to lend the amount of it to the mortgagor by paying the first mortgagee. A promise to lend a debtor money, though on technically good consideration, is not one which a court of equity should enforce for the benefit of a creditor. Nor can breach of the promise by the second mortgagee be ground for substantial damages. The only consequence of the breach is that the debtor continues

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<sup>1</sup> Ward v. De Oca, 120 Cal. 102; Morris v. Mix, 4 Kan. App. 654; Brown v. Stillman, 43 Minn. 126; Nelson v. Rogers, 47 Minn. 103; Crone v. Stinde, 68 Mo. App. 122 (reversed); Hicks v. Hamilton, 144 Mo. 495 (overruled); Harberg v. Arnold, 78 Mo. App. 237 (overruled); Wise v. Fuller, 29 N. J. Eq. 257, 266; Norwood v. Hart, 30 N. J. Eq. 412; Mount v. Van Ness, 33 N. J. Eq. 262, 265; Eakin v. Shultz, 47 At. Rep. 274 (N. J. Eq.); King v. Whitely, 10 Paige 465; Trotter v. Hughes, 12 N. Y. 74; Vrooman v. Turner, 69 N. Y. 280; Smith v. Cross, 16 Hun 487; Young Men's Assoc. v. Croft, 34 Oreg. 106; Portland Trust Co. v. Nunn, 34 Oreg. 166; Osborne v. Cabell, 77 Va. 462 *semble*.

Recovery was allowed in Cobb v. Fishel, 62 Pac. Rep. 625 (Col. App.); Dean v. Walker, 107 Ill. 541; Marble Bank v. Mesarvey, 101 Ia. 285; Heim v. Vogel, 69 Mo. 529; Crone v. Stinde, 156 Mo. 262; Hare v. Murphy, 45 Neb. 809; Brewer v. Maurer, 38 Ohio St. 543; Merriman v. Moore, 90 Pa. 78; McKay v. Ward, 20 Utah, 149; Enos v. Sanger, 96 Wis. 150.

liable to the first mortgagee instead of to the second mortgagee for the amount of the first mortgage. As the rights of the first mortgagee against the promisor cannot exceed the rights of the promisee there is no asset of value applicable to the mortgage. As the court said in the first case that presented these facts, "if the action were allowed, any one who promised to advance money to another to pay his debts would be liable to an action by the creditor."<sup>1</sup>

Another class of promises to satisfy a debtor's liability deserves particular mention—the promise of an individual or firm to pay the liabilities of an outgoing partner. It is in this kind of case that the greatest difficulty arises in determining whether there is a novation. On principle it is clear that to work a novation the promisor must make an agreement with the creditor to become directly liable to him in consideration that the creditor will accept him as debtor in place of the original debtor. It is not enough, therefore, for the creditor to learn of the promise to the original debtor and express assent to that arrangement. Such assent does not necessarily include an agreement to give up the claim against the original debtor. Moreover, the promisor must assent to enter into a contractual relation directly with the creditor. By a curious freak the law of New York<sup>2</sup> does not allow the creditor a remedy on a promise made to his debtor in this class of cases. The law of Pennsylvania,<sup>3</sup> on the other hand, though not generally adopting the doctrine of *Lawrence v. Fox*, makes an exception here in favor of the creditor. In fact, there is no reason for discriminating for or against the creditor here, and so the matter is generally treated.<sup>4</sup>

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<sup>1</sup> *Garnsey v. Rogers*, 47 N. Y. 233. The further distinction suggested by the court that the promise was not made for the benefit of the mortgagee amounts to nothing. It is true, but it is also true in any case where a grantee agrees to pay a mortgage.

The case has been followed several times, and it has been held immaterial that the deed creating the second mortgage is on its face absolute. *Pardee v. Treat*, 82 N. Y. 385; *Roe v. Barker*, 82 N. Y. 431; *Root v. Wright*, 84 N. Y. 72; *Cole v. Cole*, 110 N. Y. 630; *Smith v. Cross*, 16 Hun 487.

A similar principle was applied in favor of a grantee who was a bare trustee in *Gifford v. Corrigan*, 105 N. Y. 223.

<sup>2</sup> *Merrill v. Green*, 55 N. Y. 270; *Wheat v. Rice*, 97 N. Y. 296; *Serviss v. McDonnell*, 107 N. Y. 260; *Corner v. Mackey*, 147 N. Y. 574; *Edick v. Green*, 38 Hun 202. But see *Claffin v. Ostrom*, 54 N. Y. 581; *Arnold v. Nichols*, 64 N. Y. 117; *Hannigan v. Allen*, 127 N. Y. 639.

<sup>3</sup> *Townsend v. Long*, 77 Pa. 143; *White v. Thielens*, 106 Pa. 173; *Adams v. Kuehn*, 119 Pa. 76, 86; *Delp v. Brewing Co.*, 123 Pa. 142. But it seems to be essential that property shall have been transferred when the promise is made. *Campbell v. Lacock*, 40 Pa. 450; *Robertson v. Reed*, 47 Pa. 115; *Torrens v. Campbell*, 74 Pa. 470.

<sup>4</sup> See *e. g.* allowing the action, *Maxfield v. Schwartz*, 43 Minn. 221; *Lovejoy v. Howe*, 55 Minn. 353; *Ellis v. Harrison*, 104 Mo. 270; *Shamp v. Meyer*, 20 Neb. 223;



On the same principle the holder of a check has sometimes been given a right against the bank on which the check was drawn.<sup>1</sup> The common argument in favor of such a right is that a check is an equitable assignment of part of the fund in the bank.<sup>2</sup> If it be granted that this is unsound, that a check is in its nature an order, not an assignment, the further argument remains that the bank has promised its depositor to pay the latter's checks and that the holder of a check may sue upon this promise. There seems no valid distinction between such a case and *Lawrence v. Fox*. The bank in effect promises to pay such debtors of the depositor as the latter indicates, upon presentation of a check in proper form. No distinction can be made because the creditor to be paid is indefinite at the time the promise was made. Such is the fact in many cases, and it is rightly regarded as immaterial.<sup>3</sup>

The nature of a creditor's right against one who has promised the debtor to pay the debt is involved in determining when the statute of limitations bars the creditor's action. On principle the creditor must have a claim that has not been barred against the original debtor, and the latter must also have such a claim against the promisor. But courts which allow a direct right to the creditor against the promisor hold that though the creditor's original claim is barred he may nevertheless enforce a claim against the promisor if the statutory period has not run since the debt was assumed.<sup>4</sup>

It is when the rights of the promisee are considered that the difficulties in the American law become apparent. It seems obviously unfair to subject the promisor to suits both by the creditor and the promisee, and on the other hand the doctrine that a pro-

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*Merriman v. Social Mfg. Co.*, 12 R. I. 175; *Spann v. Cochran*, 63 Tex. 240; denying the action, *Morgan v. Randolph-Clowes Co.*, 73 Conn. 396; *Ayres v. Gallup*, 44 Mich. 13.

<sup>1</sup> *Harrison v. Wright*, 100 Ind. 515, 533; *Hawley v. Exchange Bank*, 97 Ia. 187; *Harrison v. Simpson*, 17 Kan. 508; *Chanute Bank v. Crowell*, 6 Kan. App. 533; *Fonner v. Smith*, 31 Neb. 107. *Conf. Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82. See Daniel on Negotiable Instruments, 4th ed., § 1637 *seq.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Thomas Mfg. Co. v. Prather*, 65 Ark. 27; *Morgan v. Overman Co.*, 37 Cal. 534; *Whitney v. Am. Ins. Co.*, 127 Cal. 464; *Williamson Stewart Co. v. Seaman*, 29 Ill. App. 68; *Brenner v. Luth*, 28 Kan. 581; *Bell v. Mendenhall*, 71 Minn. 330; *State v. St. Louis & S. F. Ry. Co.*, 125 Mo. 596, 615; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 56. Many other decisions might be added. *Dow v. Clark*, 7 Gray 198, decided when the Massachusetts court was disposed to restrict the creditor's right of action, is the only contrary decision.

<sup>4</sup> *Daniels v. Johnson*, 129 Cal. 415; *Kuhl v. Chicago & N. W. R. R.*, 101 Wis. 42. See also *Roberts v. Fitzallen*, 120 Cal. 482; *Robertson v. Stuhlmiller*, 93 Ia. 326.

promisee in a contract made upon good consideration furnished by him cannot sue upon it is hard to reconcile with principle. In cases where the third person is the sole beneficiary the injury to the promisee in depriving him of a right of action is purely technical, because breach of the promise causes him no pecuniary damage; but in the case of a promise to pay a debt the promisee is vitally interested in the performance of the promise. The results reached by the courts are various. In Alabama, in a case of the latter type, the court said: "The promise enured to the benefit of the creditors and *prima facie* they alone can claim payment or sue for the breach of the agreement,"<sup>1</sup> and in Maine, it was said in an early case, "the promisee can recover only nominal damages since the defendant may be liable to the beneficiary;"<sup>2</sup> but this case has recently been overruled.<sup>3</sup> In Nebraska the consignor cannot sue on a bill of lading, though the contract is with him, in the absence of proof that he was the owner of the goods, that he was liable for their loss, or that he had sustained special damage.<sup>4</sup> In Nevada, also, it was held that a promisee without pecuniary interest in the performance of a promise could not sue upon it.<sup>5</sup> In Rhode Island the rule is the same.<sup>6</sup> In New York if the third person can sue, it seems the promisee cannot. A more complete somersault than the New York court has made on this subject when dealing with mortgages cannot be imagined. In the days before *Lawrence v. Fox* was decided it had been held that the mortgagee, though not entitled to sue directly a grantee who had assumed the mortgage, might be "subrogated" to the right of the mortgagor — the promisee. Now the court holds that the promisee cannot sue, but upon paying the mortgage debt he is entitled to be subrogated to the right of the mortgagee to sue upon this promise.<sup>7</sup> Ohio has recently reached the same con-

<sup>1</sup> *Dimmick v. Register*, 92 Ala. 458, 460. *North Alabama Development Co. v. Short*, 101 Ala. 333.

<sup>2</sup> *Burbank v. Gould*, 15 Me. 118.

<sup>3</sup> *Baldwin v. Emery*, 89 Me. 496. In *Martin v. Aetna Ins. Co.*, 73 Me. 25, 28, it was held in a case of the sole beneficiary type that the promisee might sue as trustee for the beneficiary.

<sup>4</sup> *Union Pacific Ry. Co. v. Metcalf*, 50 Neb. 452. See, *contra*, *Snider v. Adams Express Co.*, 77 Mo. 523, where consignor was allowed to recover as trustee for consignee. See 4 *Elliott on Railroads*, § 1692.

<sup>5</sup> *Ferris v. Carson Water Co.*, 16 Nev. 44.

<sup>6</sup> *Adams v. Union R. R. Co.*, 21 R. I. 134.

<sup>7</sup> *Miller v. Winchell*, 70 N. Y. 437, 439; *Ayers v. Dixon*, 78 N. Y. 318. For the earlier New York decisions, see *ante*, p. 788, n. 5. In *Claffin v. Ostrom*, 54 N. Y. 581, 584, it was held that the promisee or his assignee might sue upon a pro-



clusion,<sup>1</sup> though it is in conflict with an earlier Ohio decision which was not cited.<sup>2</sup>

The idea behind the cases which deny the promisee a right of action is that by the assent of the third person a novation is created;<sup>3</sup> but as has been already shown, a contract with a debtor to pay his debt, even though the creditor assents, does not amount to a novation.

Whatever the hardship upon the promisor may be in being liable to two persons when he promised but one, most courts have found it the simpler alternative, a recovery by either party being a bar to an action by the other.<sup>4</sup> In mortgage cases especially the promisor may thus find himself in a difficult position between the mortgagee and the promisee, the grantor of the premises. If the promisor fails to keep his promise to pay the debt, he is liable to the promisee to the full amount of the debt;<sup>5</sup> and unless the promise

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mise to assume the debts of a firm, and in *Ward v. Cowdrey*, 51 Hun. 641, *affd.* 119 N. Y. 614, it was held that a promisee might sue in the absence of proof that the third person knew of or acquiesced in the arrangement. The beneficiary in these cases could not have sued.

<sup>1</sup> *Poe v. Dixon*, 60 Ohio St. 124. Compare *Blood v. Crew Levick Co.*, 171 Pa. 334, 337. The court there said: "As to the amount still due and unpaid on the mortgages . . . the plaintiff cannot recover to her own use until she has been compelled to make payment and then only to the extent of payments actually made. An action might be maintained by the holder of the mortgage in the name of the covenantor for his use upon the express covenant to pay contained in the deed; and I see no reason why an action might not be brought by a covenantor to recover damages sustained by reason of the breach."

<sup>2</sup> *Wilson v. Stilwell*, 9 Ohio St. 467. A retiring partner, who had received a promise from the remaining partner that the latter would pay the firm debts was held entitled to sue upon the promise without having first paid the debts himself.

<sup>3</sup> See also *Brewer v. Dyer*, 7 Cush. 337, 341. The promisee "might likewise have a remedy on the contract in case the plaintiff should not elect to adopt it."

<sup>4</sup> *Union Mut. L. I. Co. v. Hanford*, 143 U. S. 187; *Steene v. Aylesworth*, 18 Conn. 244, 252; *Tinkler v. Swaynie*, 71 Ind. 562; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Foster v. Marsh*, 25 Ia. 300; *Smith v. Smith*, 5 Bush 625, 632; *Baldwin v. Emery*, 89 Me. 496; *Rogers v. Gosnell*, 51 Mo. 466, 469; *Snider v. Adams Express Co.*, 77 Mo. 523; *Beardslee v. Morgner*, 4 Mo. App. 139, 143; *Megher v. Stewart*, 6 Mo. App. 139, 143; *Weinreich v. Weinreich*, 18 Mo. App. 364, 372; *Anthony v. German Am. Ins. Co.*, 48 Mo. App. 65; *Am. Nat. Bank v. Klock*, 58 Mo. App. 335; *Gunnell v. Emerson*, 73 Mo. App. 291 (*conf.* *Bethany v. Howard*, 149 Mo. 504); *Strong v. Kamm*, 13 Oreg. 172; *Edmundson v. Penny*, 1 Barr 334; *Hoff's Appeal*, 24 Pa. 200; *Blood v. Crew Levick Co.*, 171 Pa. 334; *Snyder v. Summers*, 1 Lea 534; *Callender v. Edmison*, 8 S. Dak. 81; *Hull v. Hayward*, 13 S. Dak. 291; *Jones v. Thomas*, 21 Gratt. 96. See also authorities in next note.

<sup>5</sup> *Meyer v. Hartman*, 72 Ill. 442; *Stout v. Folger*, 34 Ia. 71; *Furnas v. Durgin*, 119 Mass. 500; *Locke v. Homer*, 131 Mass. 93; *Strohauer v. Voltez*, 42 Mich. 444; *Dorrington v. Minnick*, 15 Neb. 397; *Rawson v. Copeland*, 2 Sandf. Ch. 251; *Rector v. Higgins*, 48 N. Y. 532; *Sage v. Truslow*, 88 N. Y. 240; *Wilson v. Stilwell*, 9 Ohio St.

can bear the construction of a promise to indemnify against loss, this seems sound. But the recovery of the promisee cannot affect the mortgagee's rights against the property, and if he forecloses the mortgage, the promisor loses the property and is obliged to pay the debt also. The proper relief for the promisor is an application to equity when he is sued by the promisee, for an injunction against the action on terms of payment of the debt to the mortgagee. Equity should grant such an injunction, for it does not injure the promisee, since the terms imposed amount to a decree of specific performance of the promise.<sup>1</sup> It seems also that if the mortgage has been foreclosed and the mortgagee thereby paid and the promisee freed from liability as mortgagor, the promisor should be entitled to an injunction against the collection of any judgment of the promisee against him, or if a judgment has already been collected, to an action on principles of *quasi* contract to recover back the amount collected less costs and any payment or remaining liability of the promisee to the mortgagee.

Diversity of opinion likewise prevails in regard to the right of a creditor whose debtor has received a promise to pay the debt, to sue both the new promisor and the original debtor. Courts which hold that the original contract is in effect an offer of novation naturally hold that if the creditor accepts the promisor as his debtor he releases the original debtor, and on the other hand if he elects to sue the original debtor he thereby rejects the proffered novation and cannot afterwards sue the new promisor.<sup>2</sup> The

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468; *Callender v. Edmison*, 8 S. Dak. 81; *Sedgwick on Damages*, § 789; *Sutherland on Damages*, § 765. And it makes no difference that the promisor has sold the land again. *Reed v. Paul*, 131 Mass. 129. But if the mortgagee has been paid from sale of the land the promisee can recover only nominal damages. *Muhlig v. Fiske*, 131 Mass. 110; *Williams v. Fowler*, 132 Mass. 385. See also *Wilson v. Bryant*, 134 Mass. 291.

<sup>1</sup> Compare *Ford v. Bell*, 35 Ga. 258. In that case the mortgagee sued the mortgagor. The latter having sold the premises to a third party, who had agreed to pay the mortgage, brought a bill in equity joining both the mortgagee and the purchaser, praying that the latter be compelled to pay the debt. The bill was sustained. See also *Wilson v. Stilwell*, 9 Ohio St. 467.

<sup>2</sup> *Henry v. Murphy*, 54 Ala. 246; *Hall v. Alford*, 49 S. W. Rep. 444 (Ky.); *Floyd v. Ort*, 20 Kan. 162; *Searing v. Benton*, 41 Kan. 758 (compare *Kansas Pac. Ry. Co. v. Hopkins*, 18 Kan. 499, and *Plano Mfg. Co. v. Burrows*, 40 Kan. 361. In the latter case the court held that "no one has the right to take the objection that the old debt is not extinguished, but the old debtor, and probably even he would not have such right"); *Bohanan v. Pope*, 42 Me. 93; *Brewer v. Dyer*, 7 Cush. 339; *Warren v. Batchelder*, 16 N. H. 580; *Wood v. Moriarty*, 15 R. I. 518, 522; *Phenix Iron Foundry v. Lockwood*, 21 R. I. 556.

In no case, however, has a court held that a mortgagee by seeking to recover against one who had assumed a mortgage released the mortgagor; and in *Rouse v.*

more common doctrine, however, allows the creditor a right both against the original debtor and the new promisor.<sup>1</sup>

Another question concerns the admissibility of certain defences by the promisor. When sued by the third person, the promisor may rely on facts showing that the promisee could not enforce the contract. Is the third person barred because the promisee would be? It is necessary to observe some distinctions here. The foundation of any right the third person may have, whether he is a sole beneficiary or a creditor of the promisee, is the promisor's contract. Unless there is a valid contract no rights can arise in favor of any one. Moreover, the rights of the third person, like the rights of the promisee, must be limited by the terms of the promise. If that is in terms conditional, no one can acquire any rights under it unless the condition happens.<sup>2</sup> Further, if there is a contract valid at law, but subject to some equitable defence — as fraud,<sup>3</sup>

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Bartholomew, 51 Kan. 425, the Kansas court held the mortgagor was not released though the decision is inconsistent in principle with the previous decisions of the court as to other debts.

In *Young v. Hawkins*, 74 Ala. 370, it was held that recovering judgment against the original debtor in ignorance that a new promisor had agreed to pay the debt did not bar a subsequent recovery against the latter. To make a binding election it was said knowledge of the facts is essential.

<sup>1</sup> *Hopkinson v. Warner*, 109 Cal. 133; *South Side Assoc. v. Cutler Co.*, 64 Ind. 560; *Davis v. Hardy*, 76 Ind. 272; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Stanton v. Kenrick*, 135 Ind. 382, 389; *Rothermel v. Bell & Zoller Co.*, 79 Ill. App. 667; *Wickham v. Hyde Park Assoc.*, 80 Ill. App. 523; *Rouse v. Bartholomew*, 51 Kan. 425; *Davis v. Nat. Bank of Commerce*, 45 Neb. 589; *Fischer v. Hope Mut. Life Ins. Co.*, 69 N. Y. 161; *Poe v. Dixon*, 60 Ohio St. 124, 129; *Feldman v. McGuire*, 34 Oreg. 309, 313.

<sup>2</sup> *Russell v. Western Union Tel. Co.*, 57 Kan. 230; *Fenn v. Union Co.*, 48 La. Ann. 541; *Gill v. Weller*, 52 Md. 8. But see *Orman v. North Alabama Co.*, 53 Fed. Rep. 469, 55 Fed. Rep. 18; *East v. New Orleans Ins. Assoc.*, 76 Miss. 697; *Oakland Ins. Co. v. Bank of Commerce*, 47 Neb. 717. In the first case the person to whom a telegram was sent, who was treated as the beneficiary of the contract with the telegraph company, was held subject to the requirement in that contract that the claim must be presented within 60 days. In the last two cases a mortgagee was allowed to sue on policies of insurance taken out by the mortgagor "loss payable to mortgagee" though the mortgagor had acted in such a way as would avoid the policy as to him.

<sup>3</sup> *Green v. Turner*, 80 Fed. Rep. 41; 86 Fed. Rep. 837; *Benedict v. Hunt*, 32 Ia. 27; *Maxfield v. Schwartz*, 45 Minn. 150; *Ellis v. Harrison*, 104 Mo. 270, 278; *Saunders v. McClintock*, 46 Mo. App. 216; *American Nat. Bank v. Klock*, 58 Mo. App. 335; *Wise v. Fuller*, 29 N. J. Eq. 257; *Arnold v. Nichols*, 64 N. Y. 117; *Moore v. Ryder*, 65 N. Y. 438; *Trimble v. Strother*, 25 Ohio St. 378; *Osborne v. Cabell*, 77 Va. 462. *Fitzgerald v. Barker*, 96 Mo. 661, and *Klein v. Isaacs*, 8 Mo. App. 568, to the contrary must be regarded either as overruled or distinguished on the ground that the plaintiff bought the note, payment of which was assumed, on the faith of the defendant's promise to pay it.

mistake,<sup>1</sup> or failure of consideration<sup>2</sup> — the defence may be set up against the third person. If the case is a promise to pay a debt or discharge a duty of the promisee, the rights of the third person can only be derived through the promisee, and whatever defence affects the latter affects the creditor. In the case of a promise for the sole benefit of a third person, the beneficiary may indeed be regarded as having a direct right, but he is in the position of a donee. It is no more equitable for a sole beneficiary, though himself innocent to try to enforce a promise procured by the fraud of another, than for the donee of trust property to insist on his legal title as against the *cestui que trust*.

A more difficult case arises where the defence does not relate to the origin of the contract, but is based on supervening circumstances, such as non-performance by the promisee of a counter promise made by him, or discharge by the promisee by release or rescission. The defence of non-performance should be available against the third person whether he is a sole beneficiary or a creditor of the promisee. The defence is frequently called failure of consideration. This is technically inaccurate, since the consideration for the promise was the counter promise, and that has not failed; but as the substantial matter the parties had in mind was the performance of the promises the defendant promisor has in substance not received what he bargained for. Under these circumstances it is unjust to allow a mere donee to enforce the promise; and if the third person is a creditor he is not entitled to any greater right than his debtor had.<sup>3</sup>

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<sup>1</sup> *Episcopal Mission v. Brown*, 158 U. S. 222; *Jones v. Higgins*, 80 Ky. 409; *Bogart v. Phillips*, 112 Mich. 697; *Rogers v. Castle*, 51 Minn. 428; *Gold v. Ogden*, 61 Minn. 88; *Bull v. Titsworth*, 29 N. J. Eq. 73; *Stevens Inst. v. Sheridan*, 30 N. J. Eq. 23; *O'Neill v. Clark*, 33 N. J. Eq. 444; *Green v. Stone*, 54 N. J. Eq. 387; *Crow v. Lewis*, 95 N. Y. 423; *Wheat v. Rice*, 97 N. Y. 296.

<sup>2</sup> *Clay v. Woodrum*, 45 Kan. 116; *Amonett v. Montague*, 75 Mo. 43; *Judson v. Dada*, 79 N. Y. 373, 379; *Osborne v. Cabell*, 77 Va. 462.

Several decisions present the case of a purchaser with warranty of land subject to a mortgage, who has been evicted from the premises and is thereafter sued by the holder of the mortgage. The defence was held good in *Dunning v. Leavitt*, 85 N. Y. 30; *Crow v. Lewis*, 95 N. Y. 423; *Gifford v. Father Matthew Society*, 104 N. Y. 139. But see *contra*, *Blood v. Crew Levick Co.*, 177 Pa. 606; *Hayden v. Snow*, 9 Biss. 511; 14 Fed. Rep. 70; s. c. *sub nom.* *Hayden v. Devery*, 3 Fed. Rep. 782. In the last case the decision was based on the fact that the plaintiff was a purchaser for value of the mortgage note after the defendant had assumed the mortgage. See also *Knapp v. Connecticut Mut. L. I. Co.*, 85 Fed. Rep. 329; *Connecticut Mut. L. I. Co. v. Knapp*, 62 Minn. 405.

<sup>3</sup> *Episcopal Mission v. Brown*, 158 U. S. 222; *Pugh v. Barnes*, 108 Ala. 167; *Stuyvesant v. Western Mortgage Co.*, 22 Col. 28, 33; *Miller v. Hughes*, 95 Ia. 223;

The commonest defence, that of discharge by rescission or release, is different. In the case of a sole beneficiary it is like the attempted revocation of a gift. The promisor for good consideration has given the beneficiary a right. Later he seeks to take it away by procuring the extinction of the promise. If it be admitted that the beneficiary has a direct right of his own, it ought not to be extinguished without his consent. The only question can be, when does the beneficiary's right arise — when the promise for his benefit was made or when he was notified of it or assented to it? for unless a right has vested in the beneficiary before the rescission or release he cannot object. The question is analogous to that arising upon a gift of property or the creation of a trust for the benefit of another. As a gift is a pure benefit to the donee there seems no reason why his assent should not be presumed, unless and until he expresses dissent.<sup>1</sup> According to this view the sole beneficiary acquires a right immediately upon the making of the contract and any subsequent rescission is ineffectual. There is weighty authority in support of this view;<sup>2</sup> but in most jurisdictions the distinction has not been clearly stated in the decisions between cases of sole beneficiary and cases of debtor and creditor. Most of the cases have been of the latter sort, and it has generally been laid down broadly as true of all cases that prior to the assent or acting upon the promise by the third party but not afterwards, a rescission or release is operative.<sup>3</sup> In theory, however, in a case of debtor and creditor

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see also *Willard v. Wood*, 164 U. S. 502, 521; *Loeb v. Willis*, 100 N. Y. 231. But see apparently *contra* *Cress v. Blodgett*, 64 Mo. 449; *Commercial Bank v. Wood*, 7 W. & S. 89; *Fulmer v. Wightman*, 87 Wis. 573. In Missouri and Nebraska it has been held that a surety for the promise of a contractor to a district or municipality to pay for his labor and materials is liable to workmen and material men in spite of the fact that the promisee, the district or municipality, has paid the contractor during the progress of the work to an amount not allowed by the contract. The Missouri decision relies on the fact that the plaintiffs had become creditors on the faith of the defendant's suretyship before the promisee had committed any breach of duty. The Nebraska decisions make no such distinction. *School District v. Livers*, 147 Mo. 580; *Doll v. Crume*, 41 Neb. 655; *Kaufmann v. Cooper*, 46 Neb. 644; *King v. Murphy*, 49 Neb. 670.

<sup>1</sup> Ames, *Cas. Trusts*, 2d ed., 232-234.

<sup>2</sup> *Henderson v. McDonald*, 84 Ind. 149, and *Waterman v. Morgan*, 114 Ind. 237; *Thompson v. Gordon*, 3 Strobb. 196. See also *Knowles v. Erwin*, 43 Hun 150, *affd.* 124 N. Y. 623. A few cases of the debtor and creditor type seem to hold a similar doctrine. *Starbird v. Cranston*, 24 Col. 20; *Bay v. Williams*, 112 Ill. 91; *Cobb v. Heron*, 78 Ill. App. 654, 180 Ill. 49; *Rogers v. Gosnell*, 58 Mo. 589.

The almost universal doctrine that the beneficiary of a life insurance policy acquires a vested right of which he cannot be deprived subsequently is in accord. The numerous cases are collected in 3 *Am. & Eng. Cyc.*, 2d ed., 980.

<sup>3</sup> *Biddel v. Brizzolara*, 64 Cal. 354; *Merrick v. Giddings*, 1 Mackey (D. C.) 394;

the situation is very different from that arising where the third person is a sole beneficiary. The creditor's right is purely derivative, and if the debtor no longer has a right against the promisor the creditor can have none. In one respect only has the creditor any right to object to a rescission or release. The promise to the debtor to pay the debt is a valuable right belonging to the debtor. Like his other property the debtor has no right to give it away if he thereby deprives himself of sufficient means to pay his debts. Even though insolvent, however, he has a right to change the form of his assets. Consequently to a rescission or release for adequate consideration paid to the debtor, the creditor should never have a right to object. A release or rescission by an insolvent debtor, without any consideration, or without adequate consideration, however, is a fraudulent conveyance. It is a gift of property by one whose circumstances do not justify him in giving, and the creditor may disregard the gift. Here, too, the knowledge of the promise by the third person or his assent thereto should make no difference. A promise to a debtor to pay his debt is a valuable asset whether the creditor knows of it or not, and the debtor, if insolvent, has no right to dispose of it without receiving an adequate price for it.<sup>1</sup>

Another kind of defence to a promise to pay a debt has given rise to considerable litigation. May the promisor set up that

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*Durham v. Bischof*, 47 Ind. 211; *Carnahan v. Tousey*, 93 Ind. 561; *Smith v. Flack*, 95 Ind. 116, 120; *Gilbert v. Sanderson*, 56 Ia. 349; *Cohrt v. Kock*, 56 Ia. 658; *Seifert Lumber Co. v. Hartwell*, 94 Ia. 576, 582; *Dodge's Adm. v. Moss*, 82 Ky. 441; *Mitchell v. Cooley*, 5 Rob. 243; *Cucullu v. Walker*, 16 La. Ann. 198; *Gifford v. Corrigan*, 117 N. Y. 257; *Seaman v. Hasbrouck*, 35 Barb. 151; *Holder v. Nat. Bank*, 9 Hun 108, *affd.* 73 N. Y. 599; *Wilson v. Stilwell*, 14 Ohio St. 464; *Trimble v. Strother*, 25 Ohio St. 378; *Brewer v. Maurer*, 38 Ohio St. 543; *Emmitt v. Brophy*, 42 Ohio St. 82; *McCown v. Schrimpf*, 21 Tex. 22; *Huffman v. Western Mortgage Co.*, 13 Tex. Civ. App. 169; *Clark v. Fisk*, 9 Utah 94; *Bassett v. Hughes*, 43 Wis. 319.

What is required in the way of assent or acting upon the promise is not defined. Doubtless in many jurisdictions if the third person had knowledge of the promise and made no objection he would be regarded as assenting. But in *Crowell v. Currier*, 27 N. J. Eq. 152 (s. c. on appeal *sub. nom.* *Crowell v. Hospital*, 27 N. J. Eq. 650), it was held that rescission was permissible because the third party had not altered his position, the court apparently requiring something like an estoppel to prevent a rescission; and in *Wood v. Moriarty*, 16 R. I. 201, a release by the promisee was held effectual, though the creditors had made a demand upon the promisor for the money, because the creditors "did not do or say anything inconsistent with their continuing to look to T (the original debtor) for the debt."

<sup>1</sup> This analysis finds some support in the cases of *Trustees v. Anderson*, 30 N. J. Eq. 366; *Youngs v. Trustees*, 31 N. J. Eq. 290, and *Willard v. Worsham*, 76 Va. 392 where the validity of a release by the mortgagor of one who had purchased the equity of redemption from him and assumed the mortgage was made to depend on the solvency of the mortgagor.



the debtor did not owe the debt or that it was an illegal debt? The true answer to this question depends upon the true meaning in fact of the promise rather than upon any rule of law. If the promisor's agreement is to be construed as a promise to discharge whatever liability the promisee is under, the promisor must certainly be allowed to show that the promisee was under no liability. Thus one who in return for an assignment of property assumed all the grantor's debts would certainly be allowed to dispute the validity of any debt. On the other hand, if the promise means that the promisor agrees to pay a sum of money to A, to whom the promisee says he is indebted, it is immaterial whether the promisee is actually indebted to that amount or at all. The promisee has decided that question himself. Where the promise is to pay a specific debt, for example to assume a specific mortgage, this construction will generally be the true one. Most of the cases accordingly refuse to allow one who has assumed a specific debt to set up usury<sup>1</sup> or other defences<sup>2</sup> of which the debtor might have availed himself.

In dealing with any of these defences it is obvious that all three parties should have an opportunity of litigating the question since all are interested in it, and it is desirable to have all concluded by the judgment. If a creditor who sues the promisor and is met by the defence of fraud or mistake in the contract nevertheless prevails, but being unable to collect his judgment sues the original debtor, as he would be allowed to do in many jurisdictions, clearly

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<sup>1</sup> *Millington v. Hill*, 47 Ark. 301; *People's Bank v. Collins*, 27 Conn. 142; *Henderson v. Bellew*, 45 Ill. 322; *Valentine v. Fish*, 45 Ill. 462; *Essley v. Sloan*, 16 Ill. App. 63; *Flanders v. Doyle*, 16 Ill. App. 508; *Cleaver v. Burcky*, 17 Ill. App. 92; *Stephens v. Muir*, 8 Ind. 352; *Hough v. Hersey*, 36 Mo. 181; *Log Cabin Assoc. v. Gross*, 71 Md. 456; *Scanlan v. Grimmer*, 71 Minn. 351; *Cramer v. Lepper*, 26 Ohio St. 59; *Jones v. Insurance Co.*, 40 Ohio St. 583; *Spaulding v. Davis*, 51 Vt. 77; *Conover v. Hobart*, 24 N. J. Eq. 120; *Post v. Dart*, 8 Paige 639; *Cole v. Savage*, 10 Paige 583; *Root v. Wright*, 21 Hun 344; *Sands v. Church*, 6 N. Y. 347; *Hartley v. Harrison*, 24 N. Y. 170; *Ritter v. Phillips*, 53 N. Y. 586 (payment). But see *Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 137.

<sup>2</sup> *Pope v. Porter*, 33 Fed. Rep. 7 (informal execution); *Kennedy v. Brown*, 61 Ala. 296 (coverture); *Gowans v. Pierce*, 57 Kan. 180 (unauthorized signature to note); *Cox v. Hoxie*, 115 Mass. 120 (erroneous amount); *Comstock v. Smith*, 26 Mich. 306 (coverture); *Miller v. Thompson*, 34 Mich. 10 (invalid execution); *Crawford v. Edwards*, 33 Mich. 354 (failure of consideration); *Lee v. Newman*, 55 Miss. 365 (invalidity); *Johnson v. Parmely*, 14 Hun 398 (payment); *Ferris v. Cranford*, 2 Den. 595 (payment); *Horton v. Davis*, 26 N. Y. 495 (want of record); *Freeman v. Auld*, 44 N. Y. 50 (failure of consideration); *Parkinson v. Sherman*, 74 N. Y. 88 (failure of consideration); *Bennett v. Bates*, 94 N. Y. 354, 370 (invalidity of mortgage). But see *Goodman v. Randall*, 44 Conn. 321.

the debtor cannot be concluded by the judgment in the first case and the creditor must try the same question again and perhaps with a different result. This is another illustration of the necessity of all three parties being joined in the litigation.<sup>1</sup>

None of the earlier cases which allowed a right of action to one who was not a party to the contract related to contracts under seal, and where statutes have not taken away the importance of the distinction between sealed and parol contracts the rule that one who is not a party to a contract under seal cannot sue upon it is still applied to contracts to benefit or pay a debt to a third person.<sup>2</sup> But in some states the rules of the common law distinguishing contracts under seal from other written contracts have been abolished or diminished, so that it is not surprising that the distinction as to the right of a third person to sue has also been disregarded.<sup>3</sup>

It sometimes happens that a person who is neither the promisee of a contract nor the party to whom performance is to be rendered will derive a benefit from its performance. A typical case

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<sup>1</sup> In *Green v. Stone*, 54 N. J. Eq. 387, the court held that the defence that the clause assuming payment of a mortgage was inserted in a deed by mistake must be asserted by a cross bill to which the promisee must be made a party.

<sup>2</sup> *Hendricks v. Lindsay*, 93 U. S. 143; *Willard v. Wood*, 135 U. S. 311, 313; 152 U. S. 502; *Douglass v. Branch Bank*, 19 Ala. 659; *Hunter v. Wilson*, 21 Fla. 250, 252; *Gunter v. Mooney*, 72 Ga. 205; *Moore v. House*, 64 Ill. 162; *Gautzert v. Hoge*, 73 Ill. 30; *Harms v. McCormick*, 132 Ill. 104, 109 (now changed by statute); *Hinkley v. Fowler*, 15 Me. 285; *Farmington v. Hobart*, 74 Me. 416; *Seigman v. Hoffacker*, 57 Md. 321; *Montague v. Smith*, 13 Mass. 396; *Millard v. Baldwin*, 3 Gray 484; *Robb v. Mudge*, 14 Gray 534, 538; *Flynn v. North American Life Ins. Co.*, 115 Mass. 449; *Lee v. Newman*, 55 Miss. 365, 374; *How v. How*, 1 N. H. 49; *Crowell v. Currier*, 27 N. J. Eq. 152; *Joslin v. New Jersey Car Spring Co.*, 36 N. J. L. 141, 146; *Cocks v. Varney*, 45 N. J. Eq. 72; *Strohecker v. Grant*, 16 S. & R. 237; *De Bollé v. Pennsylvania Ins. Co.*, 4 Whart. 68; *Mississippi R. R. Co. v. Southern Assoc.*, 8 Phila. 107; *McAlister v. Marberry*, 4 Humph. 426; *Fairchild v. North Eastern Assoc.*, 51 Vt. 613; *Jones v. Thomas*, 21 Gratt. 96, 101 (now changed by statute); *McCarteney v. Wyoming Nat. Bank*, 1 Wyo. 382.

<sup>3</sup> *Central Trust Co. v. Berwind-White Co.*, 95 Fed. Rep. 391; *Starbird v. Cranston*, 24 Col. 20; *Webster v. Fleming*, 178 Ill. 140; *Harts v. Emery*, 184 Ill. 560; *Robinson v. Holmes*, 75 Ill. App. 203; *Am. Splane Co. v. Barber*, 91 Ill. App. 359; 1 Bush 48; *Jefferson v. Asch*, 53 Minn. 446; *Rogers v. Gosnell*, 51 Mo. 466; 58 Mo. 589; *Van Schaick v. Railroad*, 38 N. Y. 346; *Coster v. Albany*, 43 N. Y. 399; *Riordan v. First Church*, 26 N. Y. Supp. 38; *Emmitt v. Brophy*, 42 Ohio St. 82; *Hughes v. Oregon Co.*, 11 Oreg. 437; *McDowell v. Laev*, 35 Wis. 181; *Basset v. Hughes*, 43 Wis. 319; *Houghton v. Milburn*, 54 Wis. 554; *Stites v. Thompson*, 98 Wis. 329, 331. A third person was allowed to enforce a promise under seal also in the following cases, but the point was not discussed: *South Side Assoc. v. Cutler Co.*, 64 Ind. 560; *Anthony v. Herman*, 14 Kan. 494; *Brenner v. Luth*, 28 Kan. 581. See also Va. Code, § 2415; *Newberry Land Co. v. Newberry*, 95 Va. 111.



is where A promises B to pay him money for his expenses. A creditor of B is not generally allowed to sue A.<sup>1</sup> It is obvious that such a creditor's right can properly be only a derivative one. As the obligation is to pay money to the debtor, there seems no reason why garnishment proceedings are not appropriate.

A different case arises where the promise is to indemnify against damages. Here the promisor's liability does not arise until the promisee has suffered loss or expense. Until then the promisee has no right of action, and consequently one claiming damages can assert no derivative right against the promisor, much less a direct right.<sup>2</sup> Nor can the promisee sue for the benefit of persons claiming damages.<sup>3</sup>

A third person's benefit under a contract may be still more incidental. In a recent case the failure of the grantee of land to keep his promise to the grantor to pay a mortgage, resulted in a loss to the plaintiff of an interest in the land when the mortgagee foreclosed the mortgage. The New York court rightly refused relief.<sup>4</sup> The contract was not made even partially for the plaintiff's benefit, and as the promisee was under no obligation to the plaintiff it is not possible to work out an indirect right.<sup>5</sup>

A Louisiana case<sup>6</sup> furnishes another illustration. A number of hatters agreed to close their shops on Sundays, and for any breach it was agreed that the offender should pay \$100 to a specified charitable society. It was held that the society could not recover. The object of the contract was not to benefit the plaintiff, but to enforce performance of a promise by the imposition of a penalty.

*Samuel Williston.*

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<sup>1</sup> *Cragin v. Lovell*, 109 U. S. 194, 199; *Thomas Mfg. Co. v. Prather*, 65 Ark. 27; *Burton v. Larkin*, 36 Kan. 246. See also *Jackson Iron Co. v. Negaunee Concentrating Co.*, 65 Fed. Rep. 298; *Hill v. Omaha, etc., R. R. Co.*, 82 Mo. App. 188. But see *contra* *Rothwell v. Skinker*, 84 Mo. App. 169; *Houghton v. Milburn*, 54 Wis. 554. And where an insurance company had reinsured its risks, a policy holder was allowed to sue the reinsuring company directly in *Glen v. Hope Mut. Life Ins. Co.*, 56 N. Y. 379; *Fischer v. Hope Mut. Life Ins. Co.*, 69 N. Y. 161; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50.

<sup>2</sup> *Hill v. Omaha, etc., R. R. Co.*, 82 Mo. App. 188; *French v. Vix*, 143 N. Y. 90; *Embler v. Hartford Ins. Co.*, 158 N. Y. 431; *Mansfield v. Mayor of New York*, 165 N. Y. 208.

<sup>3</sup> *New Haven v. Railroad*, 62 Conn. 253.

<sup>4</sup> *Durnherr v. Rau*, 135 N. Y. 219. See also *Pearson v. Bailey*, 62 N. E. Rep. 265 (Mass.).

<sup>5</sup> See also *Constable v. National Steamship Co.*, 154 U. S. 51; *Hennessy v. Bond*, 77 Fed. Rep. 403, 405.

<sup>6</sup> *New Orleans St. Joseph's Assoc. v. Magnier*, 16 La. Ann. 338.

## NOTE I.

Recovery allowed by a sole beneficiary in an action at law (insurance cases are not included).

ARKANSAS. *Rogers v. Galloway Female College*, 64 Ark. 627.

GEORGIA. *Wilson v. First Presbyterian Church*, 56 Ga. 554. See also Code, § 3664.

ILLINOIS. *Lawrence v. Oglesby*, 178 Ill. 122.

INDIANA. *Allen v. Davison*, 16 Ind. 416; *Beals v. Beals*, 20 Ind. 163; *Marlett v. Wilson*, 30 Ind. 240; *Miller v. Billingsly*, 41 Ind. 489; *Henderson v. McDonald*, 84 Ind. 149; *Waterman v. Morgan*, 114 Ind. 237; *Stevens v. Flannagan*, 131 Ind. 122; *Ferris v. American Brewing Co.*, 155 Ind. 539. Except for the Code the plaintiff would have to sue in equity.

KANSAS. *Strong v. Marcy*, 33 Kan. 109.

KENTUCKY. *Clarke v. McFarland's Exec.*, 5 Dana 45; *Smith v. Smith*, 5 Bush 625; *Benge v. Hiatt's Adm.* 82 Ky. 666; *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340. See also *McGuire v. McGuire*, 11 Bush 142; *Mercer v. Mercer's Adm.*, 87 Ky. 30. Except for the Code plaintiff would have to sue in equity.

LOUISIANA. Civil Code, Arts. 1884, 1896.

MARYLAND. *Owings v. Owings*, 1 H. & G. 484, 491.

MASSACHUSETTS. *Felton v. Dickinson*, 10 Mass. 287 (overruled by *Terry v. Brightman*, 132 Mass. 318; *Marston v. Bigelow*, 150 Mass. 45). See also *Felch v. Taylor*, 13 Pick. 133; *Bacon v. Woodward*, 12 Gray 376, 382; *Prentice v. Brimhall*, 123 Mass. 291.

MISSOURI. *St. Louis v. Von Phul*, 133 Mo. 561; *Devers v. Howard*, 144 Mo. 671; *Crone v. Stinde*, 156 Mo. 262; *Weinreich v. Weinreich*, 18 Mo. App. 364; *Markel v. W. U. Tel. Co.*, 19 Mo. App. 80; *Glencoe Lime Co. v. Wind*, 86 Mo. App. 163. But see *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118; *Howsmon v. Trenton Water Co.*, 119 Mo. 304.

NEBRASKA. *Hale v. Ripp*, 32 Neb. 259; *Sample v. Hale*, 34 Neb. 220; *Lyman v. Lincoln*, 38 Neb. 794; *Doll v. Crume*, 41 Neb. 655; *Korsmeyer Co. v. McClay*, 43 Neb. 649; *Chicago, etc., R. R. Co. v. Bell*, 44 Neb. 44; *Kaufmann v. Cooper*, 46 Neb. 644; *Hickman v. Layne*, 47 Neb. 177, 180; *Fitzgerald v. McClay*, 47 Neb. 816; *King v. Murphy*, 49 Neb. 670; *Rohman v. Gaiser*, 53 Neb. 474; *Pickle Marble Co. v. McClay*, 54 Neb. 661. But see *Eaton v. Fairbury Water Works Co.*, 37 Neb. 546.

NEVADA. See *Ferris v. Carson Water Co.*, 16 Nev. 44.

NEW JERSEY. *Rue v. Meirs*, 43 N. J. Eq. 377, 384; *Whitehead v. Burgess*, 61 N. J. L. 75.

NEW YORK. *Schermerhorn v. Vanderheyden*, 1 Johns. 139, 140; *Glen v. Hope Mutual L. I. Co.*, 56 N. Y. 379; *Little v. Banks*, 85 N. Y. 281; *Todd v. Weber*, 95 N. Y. 181; *Rector v. Teed*, 44 Hun 349, 120 N. Y. 583; *Buchanan v. Tilden*, 158 N. Y. 109; *Roberts v. Cobb*, 31 Hun 150; *Knowles v. Erwin*, 43 Hun 150; *affd.* 124 N. Y. 633; *Whitcomb v. Whitcomb*, 92 Hun 443; *Babcock v. Chase*, 92 Hun 264; *Luce v. Gray*, 92 Hun 599. But see *contra* *Lorillard v. Clyde*, 122 N. Y. 498; *Townsend v. Rackham*, 143 N. Y. 576; *Sullivan v. Sullivan*, 161 N. Y. 554; *Wainwright v. Queen's County Water Co.*, 78 Hun 146; *Coleman v. Hiler*, 85 Hun 547; *Buffalo Cement Co. v. McNaughton*, 90 Hun 74, *affd.* 156 N. Y. 702, re-argument denied, 157 N. Y. 703; *Glens Falls Gas Light Co. v. Van Vranken*, 11 N. Y. App. Div. 420.

OHIO. *Flickinger v. Saum*, 40 Ohio St. 591, 601; *Irwin v. Lombard Univ.*, 56 Ohio St. 9, 20.

PENNSYLVANIA. *Strohecker v. Grant*, 16 S. & R. 237, 241, *semble*; *Ayers Appeal*, 28 Pa. 179; *Hostetter v. Hollinger*, 117 Pa. 606. But see *contra* *Edmundson v. Penny*, 1 Barr 334; *Guthrie v. Kerr*, 85 Pa. 303.

## CONTRACTS FOR THE BENEFIT OF A THIRD PERSON. 805

RHODE ISLAND. *Adams v. Union R. R. Co.*, 21 R. I. 134. But see *contra* *Wilbur v. Wilbur*, 17 R. I. 295.

SOUTH CAROLINA. *Thompson v. Gordon*, 3 Strobb. 196.

UTAH. See *Montgomery v. Rief*, 15 Utah 495.

VERMONT. *Hodges v. Phelps*, 65 Vt. 303. But see *contra* *Crampton v. Ballard*, 10 Vt. 251; *Hall v. Huntoon*, 17 Vt. 244; *Fugure v. Mut. Soc. of St. Joseph*, 46 Vt. 362.

VIRGINIA. *Taliaferro v. Day*, 82 Va. 79; Code of 1887, § 2415. But see *contra* *Ross v. Milne*, 12 Leigh 204; also *Newberry Land Co. v. Newberry*, 95 Va. 111.

WEST VIRGINIA. *Johnson v. McClung*, 26 W. Va. 659, 670.

WISCONSIN. *Grant v. Diebold Safe Co.*, 77 Wis. 72.

UNITED STATES. *Nat. Bank v. Grand Lodge*, 98 U. S. 143. *Conf.* *Constable v. National Steamship Co.*, 154 U. S. 51; *conf.* *Sayward v. Dexter*, 72 Fed. Rep. 758; *U. S. v. National Surety Co.*, 92 Fed. Rep. 549; *Brown & Haywood Co. v. Ligon*, 92 Fed. Rep. 851.

### NOTE II.

Action at law allowed against one who promises to pay the debt of another (mortgage cases are not included).

ALABAMA. *Huckabee v. May*, 14 Ala. 263; *Hoyt v. Murphy*, 18 Ala. 316; *Mason v. Hall*, 30 Ala. 599; *Henry v. Murphy*, 54 Ala. 246; *Young v. Hawkins*, 74 Ala. 370; *Dimmick v. Register*, 92 Ala. 458; *North Ala. Development Co. v. Short*, 101 Ala. 333; *Potts v. First Nat. Bank*, 102 Ala. 286.

ARKANSAS. *Chamblee v. McKenzie*, 31 Ark. 155; *Talbot v. Wilkins*, 31 Ark. 411; *Hecht v. Caughron*, 46 Ark. 132; *Ringo v. Wing*, 49 Ark. 457, 464; *Benjamin v. Birmingham*, 50 Ark. 433. But see *contra* *Hicks v. Wyatt*, 23 Ark. 55, and *conf.* *Thomas Mfg. Co. v. Prather*, 65 Ark. 27.

CALIFORNIA. *Lewis v. Covelland*, 21 Cal. 189; *Morgan v. Overman Co.*, 37 Cal. 534; *Malone v. Crescent Co.*, 77 Cal. 38; *Smith v. Los Angeles, etc., Ry. Co.*, 98 Cal. 210; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547; *Whitney v. Am. Ins. Co.*, 127 Cal. 464 (overruling *McLaren v. Hutchinson*, 18 Cal. 80, *contra*).

COLORADO. *Lehow v. Simonton*, 3 Col. 346; *Green v. Morrison*, 5 Col. 18; *Starbird v. Cranston*, 24 Col. 20; *Wilson v. Lunt*, 11 Col. App. 56.

FLORIDA. *Hunter v. Wilson*, 21 Fla. 250; *Wright v. Terry*, 23 Fla. 160.

GEORGIA. *Ford v. Finney*, 35 Ga. 258, 261 (*semble*). See also Code, § 3664.

ILLINOIS. *Eddy v. Roberts*, 17 Ill. 505; *Brown v. Strait*, 19 Ill. 88; *Briston v. Lane*, 21 Ill. 194; *Rabberman v. Niskamp*, 54 Ill. 179; *Wilson v. Bevans*, 58 Ill. 232; *Beasley v. Webster*, 64 Ill. 458; *Steele v. Clark*, 77 Ill. 471; *Snell v. Ives*, 85 Ill. 279; *Shober Co. v. Kerting*, 107 Ill. 344; *Schmidt v. Glade*, 126 Ill. 485; *Cobb v. Heron*, 78 Ill. App. 654, 180 Ill. 49; *Mathers v. Carter*, 7 Ill. App. 225; *Struble v. Hake*, 14 Ill. App. 546; *Boals v. Nixon*, 26 Ill. App. 517; *Williamson-Stewart Co. v. Seaman*, 29 Ill. App. 68; *McCasland v. Doorley*, 47 Ill. App. 513; *Rothermel v. Bell & Zoller Co.*, 79 Ill. App. 667; *Kee v. Cahill*, 86 Ill. App. 561; *Am. Splane Co. v. Barber*, 91 Ill. App. 359.

INDIANA. *Cross v. Truesdale*, 28 Ind. 44; *Davis v. Calloway*, 30 Ind. 112; *Haggerty v. Johnston*, 48 Ind. 41; *Campbell v. Patterson*, 58 Ind. 66; *Loeb v. Weis*, 64 Ind. 285; *South Side Planing Mill Assoc. v. Cutler, etc., Co.*, 64 Ind. 560; *Rhodes v. Matthews*, 67 Ind. 131; *Fisher v. Wilmoth*, 68 Ind. 449; *Clodfelter v. Hulett*, 72 Ind. 137; *Medsker v. Richardson*, 72 Ind. 323; *Hendricks v. Frank*, 86 Ind. 278; *Harrison v. Wright*, 100 Ind. 515, 533; *Warren v. Farmer*, 100 Ind. 593; *Wolke v. Fleming*, 103 Ind. 105; *Redelsheimer v. Miller*, 107 Ind. 485; *Leake v. Ball*, 116 Ind. 214; *Boruff v. Hudson*, 138 Ind. 280. The early Indiana cases before the enactment of the code allowed relief only in equity. *Salmon v. Brown*, 6 Blackf. 347; *Farlow v.*

Kemp, 7 Blackf. 544; Britzell v. Fryberger, 2 Ind. 176; Conklin v. Smith, 2 Ind. 107, 109; Bird v. Lanius, 7 Ind. 615, 618.

IOWA. Johnson v. Knapp, 36 Ia. 616; Blair Co. v. Walker, 39 Ia. 406; Gilbert v. Sanderson, 56 Ia. 349; Poole v. Hintrager, 60 Ia. 180; Clinton Nat. Bank v. Stedmann, 74 Ia. 104; Knott v. Dubuque, etc., Ry. Co., 84 Ia. 462; First Nat. Bank v. Pipestone, 92 Ia. 530; Hawley v. Exchange Bank, 97 Ia. 187.

KANSAS. Harrison v. Simpson, 17 Kan. 508; Kansas Pac. Ry. Co. v. Hopkins, 18 Kan. 494; Floyd v. Ort, 20 Kan. 162; Alliance Mut. L. Ass. Soc. v. Welch, 26 Kan. 632, 641; Brenner v. Luth, 28 Kan. 581; West v. W. U. Tel. Co., 39 Kan. 93; Manufacturing Co. v. Burrows, 40 Kan. 361; Mumper v. Kelley, 43 Kan. 256; Howell v. Hough, 46 Kan. 152; Hardesty v. Cox, 53 Kan. 618.

KENTUCKY. Garvin v. Mobley, 1 Bush. 548; Dodge's Adm. v. Moss, 82 Ky. 441. But see Hall v. Alford, 49 S. W. Rep. 444.

LOUISIANA. Mayor v. Bailey, 5 Mart. 321; Marigny v. Remy, 3 Mart. (N. S.) 607; Cucullu v. Walker, 16 La. Ann. 198. See also Civil Code, Arts. 1884, 1896.

MAINE. Burbank v. Gould, 15 Me. 118; Hinkley v. Fowler, 15 Me. 285; Boharian v. Pope, 42 Me. 93; Coffin v. Bradbury, 89 Me. 476; Baldwin v. Emery, 89 Me. 496, 498.

MARYLAND. Small v. Schaefer, 24 Md. 143; Seigman v. Hoffacker, 57 Md. 321, 325. But see *contra* Hand v. Evans Marble Co., 88 Md. 226.

MASSACHUSETTS. Arnold v. Lyman, 17 Mass. 400; Carnegie v. Morrison, 2 Met. 381; Fitch v. Chandler, 4 Cush. 254; Brewer v. Dyer, 7 Cush. 337; Putnam v. Field, 103 Mass. 556, overruled by later decisions *contra*; Flint v. Pierce, 99 Mass. 68; Exchange Bank v. Rice, 107 Mass. 37; Rogers v. Union Stone Co., 130 Mass. 581; Aigen v. Boston & Me. R. R., 132 Mass. 423; Morrill v. Allen, 136 Mass. 93; Borden v. Boardman, 157 Mass. 410; White v. Mt. Pleasant Mills, 172 Mass. 462.

MINNESOTA. Sanders v. Clason, 13 Minn. 379; Hawley v. Wilkinson, 18 Minn. 527; Jordan v. White, 20 Minn. 91; Sullivan v. Murphy, 23 Minn. 6; Maxfield v. Schwartz, 43 Minn. 221; Lovejoy v. Howe, 55 Minn. 353; Sonstiby v. Keeley, 7 Fed. Rep. 447. But see Bell v. Mendenhall, 71 Minn. 331.

MISSISSIPPI. Sweatman v. Parker, 49 Miss. 19, 30.

MISSOURI. Bank of Mo. v. Benoist, 10 Mo. 519; Robbins v. Ayres, 10 Mo. 538; Carl v. Riggs, 12 Mo. 430; Meyer v. Lowell, 44 Mo. 328; Flanagan v. Hutchinson, 47 Mo. 237; Rogers v. Gosnell, 51 Mo. 466; 58 Mo. 589; Schuster v. Kas. City, etc., Ry. Co., 60 Mo. 290; Mosman v. Bender, 80 Mo. 579; Green v. Estes, 82 Mo. 337; Ellis v. Harrison, 104 Mo. 270; Winn v. Lippincott Investment Co., 125 Mo. 528; State v. St. Louis & S. F. Ry. Co., 125 Mo. 596, 615; Porter v. Woods, 138 Mo. 540; Beardslee v. Morgner, 4 Mo. App. 139; Harvey Lumber Co. v. Herriman Lumber Co., 39 Mo. App. 214; Nelson Distilling Co. v. Loe, 47 Mo. App. 31; Tennent-Stribling Shoe Co. v. Rudy, 53 Mo. App. 196; Street v. Goodale, 77 Mo. App. 318; Rothwell v. Skinker, 84 Mo. App. 169. Two early cases *contra* are overruled. Manny v. Frasier, 27 Mo. 419; Page v. Becker, 31 Mo. 466.

NEBRASKA. Shamp v. Meyer, 20 Neb. 223, Meyer v. Shamp, 26 Neb. 730, 51 Neb. 424; Fonner v. Smith, 31 Neb. 107; Kaufman v. U. S. Nat. Bank, 31 Neb. 661; Barnett v. Pratt, 37 Neb. 349; Union Pac. Ry. Co. v. Metcalf, 50 Neb. 452, 461; Tecumseh Nat. Bank v. Best, 50 Neb. 518.

NEVADA. Alcalda v. Morales, 3 Nev. 132; Bishop v. Stewart, 13 Nev. 25; Jones v. Pacific Wood Co., 13 Nev. 359, 375; Miliani v. Tognini, 19 Nev. 133.

NEW JERSEY. Berry v. Doremus, 30 N. J. L. 399; Joslin v. New Jersey Car Spring Co., 36 N. J. L. 141. See also Price v. Trusdell, 28 N. J. Eq. 200, 202; Katzenbach v. Holt, 43 N. J. Eq. 536, 550; Bennett v. Merchantville Building Assoc., 44 N. J. Eq. 116, 118; Cocks v. Varney, 45 N. J. Eq. 72, 77.

NEW YORK. Gold v. Phillips, 10 Johns. 142; Farley v. Cleveland, 4 Cow. 432; 9

Cow. 639; Ellwood *v.* Monk, 5 Wend. 235; Barker *v.* Bucklin, 2 Denio 45; Del. & Hudson Canal Co. *v.* Westchester County Bank, 4 Denio 97; Lawrence *v.* Fox, 20 N. Y. 268; Judson *v.* Gray, 17 Horr. Pr. 289; Dingeldein *v.* Third Avenue R. R. Co., 37 N. Y. 575; Barker *v.* Bradley, 42 N. Y. 316; Coster *v.* Mayor of Albany, 43 N. Y. 399; Secor *v.* Lord, 3 Keyes 525; Hutchings *v.* Miner, 46 N. Y. 456, 460; Clafin *v.* Ostrom, 54 N. Y. 581; Barlow *v.* Myers, 64 N. Y. 41; Arnold *v.* Nichols, 64 N. Y. 117; Litchfield *v.* Flint, 104 N. Y. 543; Hallenbeck *v.* Kindred, 109 N. Y. 620; Warren *v.* Wilder, 114 N. Y. 209; Hannigan *v.* Allen, 127 N. Y. 639; Clark *v.* Howard, 150 N. Y. 232; Seaman *v.* Hasbrouck, 35 Barb. 151; Adams *v.* Wadhams, 40 Barb. 225; Brown *v.* Curran, 14 Hun 260; Cock *v.* Moore, 18 Hun 31; Kingsbury *v.* Earle, 27 Hun 141; Schmid *v.* N. Y., etc., Railway, 32 Hun 335, *affid.* 98 N. Y. 634; Edick *v.* Green, 38 Hun 202; Pulver *v.* Skinner, 42 Hun 322; Reynolds *v.* Lawton, 62 Hun 596; Bogardus *v.* Young, 64 Hun 398; Cook *v.* Berrott, 66 Hun 633; Beemer *v.* Packard, 92 Hun 546. But see *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; Merrill *v.* Green, 55 N. Y. 270; Wheat *v.* Rice, 97 N. Y. 296; Serviss *v.* McDonnell, 107 N. Y. 260; Corner *v.* Mackey, 147 N. Y. 574, 582; Fairchild *v.* Feltman, 32 Hun 398; Metropolitan Trust Co. *v.* New York, etc., Ry. Co., 45 Hun 84; Clark *v.* Howard, 74 Hun 228; Feist *v.* Schiffer, 79 Hun 275.

OHIO. Crumbaugh *v.* Kugler, 3 Ohio St. 544, 549; Bagaley *v.* Waters, 7 Ohio St. 359; Dodge *v.* Nat. Exchange Bank, 30 Ohio St. 1; Emmitt *v.* Brophy, 42 Ohio St. 82.

OREGON. Baker *v.* Eglin, 11 Oreg. 333; Hughes *v.* Oregon Co., 11 Oreg. 437; Schneider *v.* White, 12 Oreg. 503; Strong *v.* Kamm, 13 Oreg. 172; Feldman *v.* McGuire, 34 Oreg. 310. But see *contra* Washburn *v.* Interstate Invest. Co., 26 Oreg. 436.

PENNSYLVANIA. Strohecker *v.* Grant, 16 S. & R. 237, 241; Hind *v.* Holdship, 2 Watts, 104; Commercial Bank *v.* Wood, 7 W. & S. 89; Beers *v.* Robinson, 9 Barr 229; Bellas *v.* Fagely, 19 Pa. 273; Townsend *v.* Long, 77 Pa. 143; White *v.* Thielen, 106 Pa. 173; Delp *v.* Brewing Co., 123 Pa. 42. But see *contra* Blymire *v.* Boistle, 6 Watts 182; Ramsdale *v.* Horton, 3 Barr 330; Campbell *v.* Lacock, 40 Pa. 450; Robertson *v.* Reed, 47 Pa. 115; Torrens *v.* Campbell, 74 Pa. 470; Kountz *v.* Holt-house, 85 Pa. 235, 237; Adams *v.* Kuehn, 119 Pa. 76; Freeman *v.* Pa. R. R. Co., 173 Pa. 274. See also Brown *v.* German-American Title & Trust Co., 174 Pa. 443, 455.

RHODE ISLAND. Merriman *v.* Social Mfg. Co., 12 R. I. 175; Wood *v.* Moriarty, 15 R. I. 518; Kehoe *v.* Patton, 50 Atl. Rep. 655.

SOUTH CAROLINA. See McBride *v.* Floyd, 2 Bailey 209; Brown *v.* O'Brien, 1 Rich. 268; Redfearn *v.* Craig, 57 S. C. 534.

TENNESSEE. Moore *v.* Stovall, 2 Lea 543; Lookout Mountain R. R. Co. *v.* Houston, 1 Pickle 224; O'Conner *v.* O'Conner, 88 Tenn. 76, 82. But see Campbell *v.* Findley, 3 Humph. 330.

TEXAS. Spann *v.* Cochran, 63 Tex. 240; Bennett *v.* Rosenthal, 3 Willson Civ. Cas. 196; Bartley *v.* Conn, 4 Tex. Civ. App. 299; 33 S. W. Rep. 604.

UTAH. Brown *v.* Markland, 16 Utah 360.

VERMONT. See Arlington *v.* Hinds, 1 D. Chip. 430; Pangborn *v.* Saxton, 11 Vt. 79, *semble*; Corey *v.* Powers, 18 Vt. 587; Rutland R. R. Co. *v.* Cole, 24 Vt. 33; Chapman *v.* Mears, 56 Vt. 389; Congregational Soc. *v.* Flagg, 72 Vt. 248.

VIRGINIA. Vanmeter's Ex. *v.* Vanmeters, 3 Gratt. 148 (in equity); Jones *v.* Thomas, 21 Gratt. 96 *semble*. See also Code, § 2415. *Contra* is Stewart *v.* James River & Kanawha Co., 24 Gratt. 294.

WASHINGTON. Don Yook *v.* Washington Mill Co., 16 Wash. 459.

WEST VIRGINIA. Hooper *v.* Hooper, 32 W. Va. 526; Bensimer *v.* Fell, 35 W. Va. 15, 29; Code 1887, c. 71, § 2. But see *contra* Johnson *v.* McClung, 26 W. Va. 659.

WISCONSIN. *Kimball v. Noyes*, 17 Wis. 695; *Putney v. Farnham*, 27 Wis. 187; *McDowell v. Laev*, 35 Wis. 171; *Bassett v. Hughes*, 43 Wis. 319; *Hoile v. Bailey*, 58 Wis. 434; *Winninghoff v. Witting*, 64 Wis. 180; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50; *Jones v. Foster*, 67 Wis. 296, 309; *Ingram v. Osborn*, 70 Wis. 184, 193; *Nix v. Wiswell*, 84 Wis. 334; *Fulmer v. Wightman*, 87 Wis. 573; *New York Life Ins. Co. v. Hamlin*, 98 Wis. 17, 23.

## NOTE III.

A mortgagee may sue at law a grantee of the mortgagor who assumes the mortgage.

ALABAMA. *Orman v. North Alabama Co.*, 53 Fed. Rep. 469; 55 Fed. Rep. 18.

ARIZONA. *Johns v. Wilson*, 180 U. S. 446.

ARKANSAS. *Patton v. Adkins*, 42 Ark. 197; *Benjamin v. Birmingham*, 50 Ark. 433.

CALIFORNIA. *Wormouth v. Hatch*, 33 Cal. 121; *Biddel v. Brizzolara*, 64 Cal. 354; *Williams v. Naftzger*, 103 Cal. 438; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547; *Tulare County Bank v. Madden*, 109 Cal. 312; *Hopkins v. Warner*, 109 Cal. 133; *Roberts v. Fitzallen*, 120 Cal. 482; *Daniels v. Johnson*, 129 Cal. 415.

COLORADO. *Green v. Morrison*, 5 Col. 18; *Stuyvesant v. Western Mtge. Co.*, 22 Col. 28; *Skinner v. Harker*, 23 Col. 333; *Starbird v. Cranston*, 24 Col. 20; *Cobb v. Fishel*, 62 Pac. Rep. 625.

CONNECTICUT. See *Bassett v. Bradley*, 48 Conn. 224; *Lynch v. Moser*, 72 Conn. 714. *Conf. Meech v. Ensign*, 49 Conn. 191. General Stat., § 983.

GEORGIA. See *Ford v. Finney*, 35 Ga. 258.

ILLINOIS. *Rogers v. Herron*, 92 Ill. 583; *Thompson v. Dearborn*, 107 Ill. 87; *Bay v. Williams*, 112 Ill. 91; *Hazle v. Bondy*, 173 Ill. 302; *Webster v. Fleming*, 178 Ill. 140; *Cotes v. Bennett*, 183 Ill. 82; *Harts v. Emery*, 84 Ill. App. 317; 184 Ill. 560; *Baer v. Knewitz*, 39 Ill. App. 470; *Ingram v. Ingram*, 71 Ill. App. 497; 172 Ill. 287; *Robinson v. Holmes*, 75 Ill. App. 203; *Boisot v. Chandler*, 82 Ill. App. 261; *Eggleson v. Morrison*, 84 Ill. App. 625; *Murray v. Emery*, 85 Ill. App. 348; 58 N. E. Rep. 327.

INDIANA. *Day v. Patterson*, 18 Ind. 114; *McDill v. Gunn*, 43 Ind. 315; *Smith v. Ostermeyer*, 68 Ind. 432; *Rick v. Hoffman*, 69 Ind. 137; *Carnahan v. Tousey*, 93 Ind. 561; *Stanton v. Kenrick*, 135 Ind. 382; *Berkshire L. I. Co. v. Hutchings*, 100 Ind. 496; *Lowe v. Hamilton*, 132 Ind. 406.

IOWA. *Corbett v. Waterman*, 11 Ia. 86; *Moses v. Clerk*, 12 Ia. 139; *Thompson v. Bertram*, 14 Ia. 476; *Scott's Adm. v. Gill*, 19 Ia. 187; *Bowen v. Kurtz*, 37 Ia. 239; *Ross v. Kennison*, 38 Ia. 396; *Lamb v. Tucker*, 42 Ia. 118; *Luney v. Mead*, 60 Ia. 469; *Beeson v. Green*, 103 Ia. 406.

KANSAS. *Anthony v. Herman*, 14 Kan. 494; *Schmucker v. Sibert*, 18 Kan. 104; *Rickman v. Miller*, 39 Kan. 362; *Searing v. Benton*, 41 Kan. 758; *Anthony v. Mott*, 61 Pac. Rep. 509.

LOUISIANA. *Ferguson's Succession*, 17 La. Ann. 255; *Vinet v. Bres*, 48 La. Ann. 1254.

MINNESOTA. *Jordan v. White*, 20 Minn. 91; *Follansbee v. Johnson*, 28 Minn. 311; *Lahmers v. Schmidt*, 35 Minn. 434; *Scanlan v. Grimmer*, 71 Minn. 351.

MISSISSIPPI. *Vigniau v. Ruffins*, 1 Miss. 312; *Lee v. Newman*, 55 Miss. 365.

MISSOURI. *Belt v. McLaughlin*, 12 Mo. 433; *Cress v. Blodgett*, 64 Mo. 449; *Heim v. Vogel*, 69 Mo. 529; *Fitzgerald v. Barker*, 4 Mo. App. 105; 70 Mo. 685; 13 Mo. App. 192; 85 Mo. 13; 96 Mo. 661; *Nelson v. Brown*, 140 Mo. 580; *Pratt v. Conway*, 148 Mo. 291; *Saunders v. McClintock*, 46 Mo. App. 216; *Commercial Bank v. Wood*, 56 Mo. App. 214; *Wayman v. Jones*, 58 Mo. App. 313; *Am. Nat. Bank v. Klock*, 58 Mo. App. 335. *Page v. Becker*, 31 Mo. 466, *contra*, is overruled.

NEBRASKA. *Cooper v. Foss*, 15 Neb. 515; *Bond v. Dolby*, 17 Neb. 49; *Rockwell v. Blair Bank*, 31 Neb. 128; *Hare v. Murphy*, 45 Neb. 809.



**CONTRACTS FOR THE BENEFIT OF A THIRD PERSON. 809**

NEVADA. *Ruhling v. Hackett*, 1 Nev. 360.

NEW YORK. *Burr v. Beers*, 24 N. Y. 178; *Ricard v. Sanderson*, 41 N. Y. 179; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Campbell v. Smith*, 71 N. Y. 26; *Parkinson v. Sherman*, 74 N. Y. 88; *Thayer v. Marsh*, 75 N. Y. 340; *Ayers v. Dixon*, 78 N. Y. 318, 323; *Judson v. Dada*, 79 N. Y. 373; *Hand v. Kennedy*, 83 N. Y. 149; *Root v. Wright*, 84 N. Y. 72; *Gifford v. Corrigan*, 117 N. Y. 257; *New York L. I. Co. v. Aitkin*, 125 N. Y. 660; *Wager v. Link*, 134 N. Y. 122, 150 N. Y. 549; *Blass v. Terry*, 156 N. Y. 122; *Rush v. Dilks*, 43 Hun 282. But see cases cited *ante*, p. 788, n. 5.

NORTH DAKOTA. See *Moore v. Booker*, 4 N. D. 543.

OHIO. *Thompson v. Thompson*, 4 Ohio St. 333, 353; *Brewer v. Maurer*, 38 Ohio St. 543; *Society of Friends v. Haines*, 47 Ohio St. 423; *Pendery v. Allen*, 50 Ohio St. 121.

PENNSYLVANIA. *Hoff's App.* 24 Pa. 200; *Lenning's Est.*, 52 Pa. 135, 139; *Merri-man v. Moore*, 90 Pa. 78; *Blood v. Crew Levick Co.*, 177 Pa. 606; *Wunderlich v. Sadler*, 189 Pa. 469, 470.

RHODE ISLAND. *Urquhart v. Brayton*, 12 R. I. 169; *Mechanics Savings Bank v. Goff*, 13 R. I. 569.

SOUTH DAKOTA. *Granger v. Roll*, 6 S. D. 611; *Miller v. Kennedy*, 12 S. D. 478, 481; *Hull v. Hayward*, 13 S. D. 291, 295; *Connor v. Jones*, 72 N. W. Rep. 463.

TENNESSEE. *Moore v. Stovall*, 2 Lea, 543.

TEXAS. *McCown v. Schrimpf*, 21 Tex. 22; *Huffman v. Western Mortgage Co.*, 13 Tex. Civ. App. 169.

UTAH. *Clark v. Fisk*, 9 Utah 94; *Thompson v. Cheesman*, 15 Utah 43; *McKay v. Wood*, 20 Utah 149.

WASHINGTON. *Ordway v. Downey*, 18 Wash. 412; *Ver Planck v. Lee*, 19 Wash. 492.

WISCONSIN. *Bishop v. Douglas*, 25 Wis. 696; *Kollock v. Parcher*, 52 Wis. 393; *Palmeter v. Carey*, 63 Wis. 426; *Enos v. Sanger*, 96 Wis. 150; *Morgan v. South Milwaukee Co.*, 97 Wis. 275; *Stites v. Thompson*, 98 Wis. 329.

## THE CHANGES IN THE ALLEGIANCE AND LAWS OF COLONIAL NEW YORK.

### I. CHANGES IN ALLEGIANCE.

**T**HE old Dutch Records of the City of New York present in curiously quaint and vivid form the legal formalities of three successive conquests of the territory which is to-day New York. These records, preserved for over two hundred years in manuscript, have only within the last five been put into a form accessible to the general public.<sup>1</sup> They begin with the year 1653 and record the transactions taking place before the Burgomasters and Schepens of New Amsterdam down to the year 1674. These officers were not only the executive and administrative head of the city but they were a court of general jurisdiction for the trial of both criminal and civil causes. In a more extensive way this court exercised over the territory within its jurisdiction much the same legislative and judicial functions as did the early Great and General Court in Massachusetts. Moreover through its Schout, or Sheriff, it proceeded directly not only to enforce its judgments and inflict the punishments it had decreed, but preserved order throughout the city and executed the treaties which the higher political powers had made.

Amongst the entries of licenses granted, records of pleadings and judgments, orders of the sheriff, decrees of divorce and the hundred and one other record entries of a busy court, we find the legal formalities of three changes of allegiance. In 1664 Dutch New Amsterdam became English "New Yorck." In 1673 the "Court of Mayor & Aldermen for the Citty of New Yorck" gave way in its turn to the Court of Burgomasters & Schepens of New Orange. Finally, in the following year (1674), the city again became the English New York.

In August of 1664 rumors of an English invasion had become so persistent in New Amsterdam that at the meeting of August 25th they were formally considered by the assembled Burgomasters and Schepens. The Court passed four resolutions:—

"At this conjuncture of time and current rumors, the Board in actual session, decrees and resolves:—First, that one third of the

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<sup>1</sup> "The Records of New Amsterdam from 1653 to 1674 Anno Domini" published by the City of New York. 7 vols. 1897.



inhabitants as Burghers of this City, without any exception shall appear in person or put another in his place furnished with a shovel, spade or wheel-barrow, to labour every third day at the City's works, on a penalty of six guilders.

2. That the guard shall be kept and a whole company paraded which shall commence this day and that the drum shall be beaten at five o'clock in the afternoon.

3. That every one who mounts guard shall receive one pound of powder and a pound and a half of lead.

4. That the brewers shall not malt any hard grain during eight days nor brew beer higher than twelve guilders the ton."

Further it was resolved :—

"To demand the following by form of petition from the Right Honorable Director General & Council :

Whereas we are of a certainty informed, that four frigates have arrived from Old England at Boston or thereabouts in N. England, provided with a considerable number of soldiers with intention as reports run, to attack and invade this place and the adjoining districts especially on Long Island, and are even now on the way to come here, which should the consequence thereof make itself manifest requires that this place be put in proper defence ; Your Honors humble petitioners find themselves therefore necessitated to apply to your Honors requesting, that you should be pleased to favour this place with eight pieces of good and heavy cannon provided with their carriages, balls, swabs, brushes, picks and spoons which being granted, this place being then provided with a quantity of twenty-two pieces, they demand also for each piece fifty pounds of powder amounting to the quantity of eleven hundred pounds and ball in proportion, also six hundred pounds of lead for bullets, to be used by the Burghers for their muskets ; and whereas it is to be feared that this place shall have to bear the first attack, before the fort be assaulted, therefore it is necessary to demand a greater number of people, than the Burghery can turn out, and as your petitioners have resolved, that a company of Burghers shall keep guard every night, they request that the same be strengthened at first by soldiers and the Company's servants, and that the day watch shall be kept by soldiers at both gates, and in case of being besieged or attacked by those, who seek to injure us, that all the soldiers and Company's servants with the Burghery shall repair to this City's walls, it being considered that this place being lost the fort is not tenable or very little so ; and if it hap-

pen that in skirmishing any Burghers should require powder, he shall have free access to the Company to be furnished there with powder, on which very fair and not less necessary request, they await Your Hon<sup>rs</sup> disposition and remain your Honours' faithful subjects, Schout, Burgomasters and Schepens of the City aforesaid : — Jonnes Nevius, Secretary."

On the following day the answer was received : —

"The proper fortifying of this place is not only granted to the petitioners for this time, but also earnestly recommended ; which that it may be most speedily affected, the Director General and Council have already thereunto distributed the aid of the Hon<sup>ble</sup> Comp<sup>rs</sup> negroes, and this day the assistance of a corporal's guard of soldiers ; we shall assist with all possible might and means. What regards the request for some fit and heavy guns in addition to the fourteen pieces previously delivered to the City, six pieces additional are allowed with suitable powder and ball requisite, and necessary thereunto, to wit., one thousand pounds of powder and six hundred pounds of lead. As to the required aid of the Comp<sup>rs</sup> Military to assist with the Burghery to defend the City, the D<sup>r</sup> General and Council consider it to be absolutely necessary and also promise to do to the utmost ; suitable orders shall, in this conjuncture be issued therefor ; and it is provisionally allowed that one half the number of people shall watch by night with the Burghery and attend to the day watch at the City gates, so long as the Burghery work."

On the 16th of September, ten days after the surrender to the English, the Court feels called upon to explain the important events which have transpired. It resolves to write the following to the Lord Directors : —

"RIGHT HONORABLE PRUDENT LORDS, THE LORDS DIRECTORS OF THE HONORABLE WEST INDIA COMPANY, DEPARTMENT OF AMSTERDAM.

Right Honorable Lords,

We, your Hon<sup>rs</sup> loyal, sorrowful and desolate subjects, cannot neglect nor keep from relating the event, which thro' God's pleasure thus unexpectedly happened to us in consequence of your Honor's neglect and forgetfulness of your promise — to wit, the arrival here of late of four Kings' frigates from England, sent hither by his Majesty and his brother, the Duke of York, with commission to reduce not only this place, but also the whole N.

Netherland under his Majesty's authority, whereunto they brought with them a large body of soldiers, provided with considerable ammunition. On board one of the frigates were about four hundred and fifty as well soldiers as seamen, and others in proportion.

The frigates being come together in front of Najac in the Bay, Richard Nicolls, the admiral, who is ruling here at present as Gouvernour, sent a letter to our Director General, communicating therein the cause of his coming and his wish. On this unexpected letter the General sent for us to determine, what was to be done herein. Whereupon it was resolved and decided to send some Commissioners thither, to argue the matter with the General and his three Commissioners, who were so sent for this purpose twice, but received no answer, than that they were not come here to dispute about it, but to execute their order and commission without fail either peaceable or by force, and if we had anything to dispute about it, it must be done with his Majesty of England, as we could do nothing here in the premises. Three days' delay was demanded for consultation ; that was duly allowed. But meanwhile they were not idle ; they approached with their four frigates, two of which passed in front of the Fort, the other anchored about Nooten Island and with five companies of soldiers encamped themselves at the Ferry, opposite this place, together with a newly raised Company of horse and a party of new soldiers, both from the North and from Long Island, mostly all our deadly enemies, who expected nothing else but pillage, plunder and bloodshed, as men could perceive by their cursing and talking when mention was made of a capitulation.

Finally, being then surrounded, we saw little means of deliverance ; we resolved what ought to be here done, and after we had well enquired into our strength and had found it to be full fifteen hundred souls strong in this place, but of whom not two hundred and fifty men are capable of bearing arms exclusive of the soldiers, who were about one hundred and fifty strong, wholly unprovided with powder both in the City and in the fort ; yea, not more than six hundred pounds were found in the fort besides seven hundred pounds unserviceable. Also because the farmers, the third man of whom was called out, refused, we with the greater portion of the inhabitants considered it necessary to remonstrate with our Director General and Council, that their Honors might consent to a Capitulation, whereunto we laboured according to our duty and had much trouble ; laid down and considered all the difficulties, which should arise from our not being able to resist such an enemy, as they

besides could receive a much greater force than they had under their command.

The Director General and Council at length consented thereunto, whereto Commissioners were sent to the Admiral, who notified him that it was resolved to come to terms in order to prevent the shedding of blood, if a good agreement could be concluded.

Six persons were commissioned on each side for this purpose to treat on this matter, as they have done and concluded in manner as appears by the articles annexed. How that will result time shall tell.

Meanwhile since we have no longer to depend on your Honours' promises of protection, we, with all the poor, sorrowing and abandoned Commonalty here must fly for refuge to the Almighty God, not doubting but He will stand by us in this sorely afflicting conjuncture and no more depart from us ; And we remain Your sorrowful and abandoned subjects.

PIETER TONNEMAN

PAULUS LEENDERZEN VAN DER GRIFT

CONELIS STEENWYSCK

JACOB BACKER

TYMOTHEUS GABRY

ISAACK GREVENRAAT

NICOLAAS DE MYER

Done in Jorck heretofore named Amsterdam in New Netherland  
A 1664 the 16th September."

The Articles of Surrender had not only guaranteed liberty and property to private subjects and the preservation of Dutch customs, but had expressly provided that "All inferior civil officers and magistrates shall continue as they now are (if they please)." For almost a month the old Burgomasters and Schepens continued to hold court and administer public affairs as unconcernedly as if Sir Richard Nicolls and his English followers had never succeeded to Director General Peter Stuyvesant.

"Friday, 14th October 1664 at one o'clock in the afternoon having been sent for, appeared at this City Hall Pieter Tonneman, Paulus Leenderzen van der Grift, Cornelis Steenwysck, Jacob Backer, Tymotheus Gabry, Isaack Grevenraat, Nicolas de Myer, Allard Anthony, Joannes de Piester, Jacob Kip, Jacques Cousseau, Isaack de Foreest, Jeronimus Ebbinck.

Burgomasters reported, Governour Richard Nicolls had the evening previous informed them, that he should appear in person

to administer the oath and with that view Burgomasters should summon to this City Hall the Magistracy of this City and some of the principal inhabitants. After which Governour Nicolls appeared in person with his Secretary at this City Hall, enquiring where Petrus Stuyvesant, Secretary Van Ruyven and the preachers were? It was thereunto answered, it was not known that they should be sent for. To which the Governour Nicolls said, that they should be sent for. Who being invited they immediately came.

The Governour Nicolls requests of the present assembly to take the following oath :—

‘I swear by the name of Almighty God that I will be a true subject to the king of Great Britain and will obey all such commands as I shall receive from his majestie, his Royall Highnesse James duke of Yorck and such governours, and Officers as from time to time are appointed over me by his Authority and none other whilst I live in any of his majesties territories. So help me God.’

The preceding oath being read to the meeting by Governour Nicolls divers debates occured thereupon by some of the assembly. Finally all in the meeting roundly declared that they could not take such oath, unless Mr. Nicolls should please to add to the said oath — CONFORMABLE TO THE ARTICLES CONCLUDED ON THE SURRENDER OF THIS PLACE as they feared by taking such oath they might nullify or render void the articles.

Then D<sup>e</sup> Megapolensius<sup>1</sup> and Secretary van Ruyven stated that they saw no impediments to taking such oath. Nevertheless divers words occurred over and hither thereupon; after which Governour Richard Nicolls finally departed with his secretary from the meeting. The assembly also then adjourned.

On the Tuesday following the Burgomasters went with the Treasurer's book of the City accounts to Governour Richard Nicolls, and placed the same in his hands together with the bond granted to the City by the late Director General and Council. After which divers debates arose on both sides in presence of Col. Cartwright and Mr. Thomas Willet regarding the oath, and then the Governor said, that the Commonalty were greatly distracted by some. Burgomasters then declared, that they had no knowledge thereof and persisted again that they could not take the oath before and until it was thereunto added — CONFORMABLE

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<sup>1</sup> Dr. Megapolensius was the leading minister of the colony

TO THE ARTICLES CONCLUDED AT THE SURRENDER OF THIS PLACE. Whereupon the Governour exhibited and delivered to the Burgomasters the following writing :—

‘Whereas there is a false and injurious aspersion cast upon the Oath of Obedience to his Ma<sup>tie</sup> his Royall Highness the duke of Jorck and the Governo<sup>r</sup> and Officers appointed by his Majesty Authoriti, and that some persons have maliciously sought to distract the minds of the inhabitants of New Jorcke by suggesting that the Artycles of peace so late and solemnly made, signed, and sealed were intended by that Oath to be made Null and of none effect, to the end that such wicked practices may not take the effect for w<sup>ch</sup> they are designed and that all now under his Ma<sup>ties</sup> obedience as denizenz of his towne may be undeceived and not give any longer credit to the disturbers of the peace of this Government, I doe thinke fitt to declare that the Articles of Surrender are not in the last broken or intended to be broken by any words or expressions on the said Oath, and if any person or persons here after shall presume to give any other construction of the joind Oath then is herein declared I, schal accompt him or them disturbers of the peace of his Ma<sup>ties</sup> subjects and procede accordingly, I doe further appoint and order that this declarond bee forthwith read, to all the Inhabitants and Registred ; as also that every denizen under my Government doe take the said capital oath who intend to remane here under His Ma<sup>ties</sup> Obedience. Given under my hand this eighteenth day of October in the yeare of our Lord God 1664 ; was signed Richards Nicolls.’

20th October 1664. In this City-hall assembled Piter Tonne-  
man, Paulus Leenderts van der Grift, Cornelis Steenwyck, Tymo-  
theus Gabry, Isaack Grevenraat, Nicolaas de Meyer, Allard  
Anthony Joannes van Brugh, Joannes de Peister, Hendrick Janzen  
vander Vin, Jacob Kip, Hendrick Kip, The Elder, Jacques Cous-  
seau, Jeronimus Ebbinck, Govert Loockermans, Isaack de Foreest,  
Jan Vinge.

The proceedings which took place as well on the 14th October as afterwards, and the writing of Governour Nicolls being read to the meeting, it was asked whether the aforesaid oath could not be taken, inasmuch as Mr. Nicolls stated in writing, that the articles of the surrender of this place are not broken in the least nor intended to be broken? Whereupon it was universally resolved in the affirmative, provided the above named Governour Nicolls shall



seal his given writing. Then Mr. Tonneman says, he cannot give his advice thereupon as he intends to depart for Holland with the ship lying ready to sail.

Tuesday 22nd November. In the afternoon at the City Hall. Present the Schout, Burgomasters and Schepens, as well in office as Old, except Allard Anthony and Jacob Kip.

The Assembly being formed as A Common Council is informed by the President for what purpose the meeting is called — to wit whereas the Officer Pieter Tonneman has acquainted the Burgomasters and Schepens that he intends to depart with the ship *the Eendracht* lying ready to sail, and therefore requests that another may be chosen in his place, therefore they are to nominate three or four persons, which being done Allard Anthony is chosen as Officer of this City in place of Pieter Tonneman by plurality of votes and with the approbation of the Hon<sup>ble</sup> Governour Nicolls.

Copy of letter written to His Royal Highness James Duke of York, by the Grace of God our most Gracious Lord, Health!

It has pleased God to bring us under your R. H.'s obedience wherein we promise to conduct ourselves as good subjects are bound to do, deeming ourselves fortunate that his Highness has provided us with so gentle, wise and intelligent a gentleman as Governor as the Hon<sup>ble</sup> Colonell Nicolls, confident and assured that under the wings of this valiant gentleman we shall bloom and grow like the Cedar on Lebanon, especially because we are assured of his Royal Highness' excellent graciousness, for his subjects and people.

The Schout, Burgomasters and Schepens of this City of New Yorck of the Island of Manhattan, Your Royal Highness faithful subjects and humble liegemen hereby request, that his Highness would be pleased to benefit and favor this place with the same rights and privilege, that his Majesty our King and most Gracious Lord is conferring on all his subjects in England; that is that ships of all nations may come and bring into England the products of their own country and may sail thence thereunto back again free and without impost on condition of paying the King's duty. But inasmuch as this place has been some years impoverished by onerous recognitions, which we have been heretofore, obliged to pay, We therefore, thro' regard for this our Commonalty and the prosperity of his Highness', our Most Gracious Lord's lands in this Province, and not only for our, your Highness' humble loyal subjects eternal praise, but also as a general renown for his Royal

Highness throughout all Christendom, pray that no more be paid here for five or six years than ships and goods pay, which come from other places out of England, or even from England to Boston or any places in New England or else go to their own countries, which being so long free of all burthens or at least paying but few, we doubt not but his Royal Highness will at the close of these years learn with hearty delight the advancement of this province even to a place from which your Highness shall come to derive great revenues, being then peopled with thousands of families and great trade by sea from New England and other places out of Europe, Africa or America. And in order that everything may be taken in hand with greater pleasure, zeal and courage we respectfully request that all privileges and prerogatives, which his Royal Highness may please to grant this place in addition to those inserted and conditioned in the capitulation on the surrender of this place may be made known by letters Patent from his Royal Highness and his Majesty of Great Britain, our Lord, not only in the United Provinces, but also in France, Spain and other Hansa and Eastern places.

Praying then his Royal Highness to be pleased to take our interest and the welfare of this country into serious consideration; and if his Highness would please to vouchsafe to write a letter to us, his dutifull subjects he will oblige us more and more to pray for his Royal Highness, our most gracious Lord, that God the Lord may spare your H. in long continued health and prosperity. We are and remain your Royal Highness' dutiful subjects, Schout, Burgomasters and Schepens of this City. Cornelis Steenwyck; By order of the Wl. Schout, Burgomasters, and Schepens of this City aforesaid; Joannes Nevius Secrety. Done, New Yorck on Manhattans Island 1664, the 22nd November and was sealed with the Great Seal of this City impressed on Red Wax.

Thursday, 24th November 1664. In the City Hall, Present the Heeren Pieter Tonneman, Cornelis Steenwyck, Paulus Leenderzen van der Grift Tymotheus Gabry, Nicolaes de Meyer.

The President states, that with the approbation of the Honorable Governor Nicolls, he had written the preceding letter to his Royal Highness, Duke of Yorck, which he could not communicate to the meeting before as his Honor had it with his letter, which he had written to the same his Royal Highness. He therefore communicates it this day, asking their opinion thereof. Whereupon all answer, 'Tis Well.'"



New Amsterdam was now New York, and for nine years the loyal Dutchmen of New Netherlands remained the "faithful subjects and humble liegemen" of his Royal Highness the Duke of York. By slow degrees the Court of Burgomasters and Schepens became the English Court of Mayor and Aldermen.

But no sooner were the affairs of New York running smoothly in English fashion than again the Colony was called upon to change its allegiance and the Duke of York lost his loyal Dutch subjects. In 1672 war had been declared between England and Holland, and while their armies were battling for supremacy in the Netherlands, a Dutch fleet had been sent against the English colonies in America. This fleet, in 1673, succeeded in capturing New York.

On the 12th day of August, in that year, the Council of War summoned the Magistrates and the principal Burgher officers to a meeting and absolved them from their oaths previously taken to the English Government, "and further recommended them to do their duty, so that no disorder may be committed in this place, until the government and magistrates of this city be restored by the Admirals and Council of War."

No time was lost in abolishing the English municipal system and restoring the ancient Dutch institutions. Within a week the authorities were able to publish the following proclamation :—

"The Commanders and Honorable Council of war in the service of their High Mightinesses the Lords States General of the United Netherlands and His Serene Highness the Prince of Orange, etc. Health !

Whereas We have thought proper for the greater advantage and prosperity of this Our City of New Orange, newly restored to the obedience of their aforesaid High Mightinesses the Lords States General of the United Netherlands and his Serene Highness the Prince of Orange, to reduce the form of the Government of this City to the former character of Schout, Burgomasters and Schepens, as is in practice in all the cities of Our Fatherland, in order that justice may be distributed and administered to all good inhabitants without respect or regard for persons :—

We therefore, in virtue of our commission, in the name and on the behalf of the High and Mighty Lords States General of the United Netherlands and his Illustrious Highness the Prince of Orange have, from the nomination exhibited by the Commonalty, elected as Regents of this City for the time of one current year as follows :—

As Schout :

ANTHONY DE MILT.

As Burgomasters :

JOHANNIS VAN BRUGEN,  
JOHANNIS DEPEYSTER,  
EGIDIUS LUYCK.

As Schepens :

WYLLEM BEECKMAN,  
JERONYMUS EBBYNG,  
JACOB KIPP,  
LOUWERENS VAN DER SPIEGEL,  
GELEYN VERPLANCK.

Which aforenamed Schout, Burgomasters and Schepens are hereby authorized and empowered to govern the inhabitants of this City, as well as Burghers and strangers, in conformity to the laws and statutes of our Fatherland and to make such ordinances therefor, as they shall find for the advantage of this City and its inhabitants. And the inhabitants of this City are strictly ordered and charged to respect and honour the above named Regents in their respective qualities as all honest and faithful subjects are bound to do : Done Willem-Hendrick, ady this 17th August A. 1673.

JACOB BENCKES    CORNELIS EVERSTEN the Younger  
NICOLAES BOES    A. COLVE  
AP VAN TEYLL "

Following this in the record is the oath taken by the Magistrates : —

"We, Schout, Burgomasters and Schepens with the Secrety of the City of New Orange, qualified by the right puissant Council of War, promise and swear in the presence of Almighty God, that we, each in this our quality, shall according to the best of our knowledge pronounce good law and justice between parties in the cases brought before us, without any passion ; that we shall promote the welfare of this City maintain in all things the pure and true Christian Religion conformably to the Word of God and the order of the Synod of Dordrecht, as taught in the Church of Netherland ; obey maintain and assist to uphold in all things the high authority placed over us, or yet to be placed over us in the name of their Mightinesses the Lords States General of the United Netherlands and his Highness the Prince of Orange,

against all that may oppose it as much as lies in our power. So truly Help us God !”

The record then continues : —

“ 18th August, The Chosen Burgomasters and Schepens have further resolved to send the Schout and Burgomast Luyck to the Commanders, to confer with them on some necessary matters.

Returning this day they report, they were expressly charged by the Honorable Commanders, that the Magistrates should take care, that the Burghers of this City may be sworn forthwith ; likewise that the Mace, Gowns and City Seal of the late Mayor Jno. Lawrence be brought in together with the Constables’ staves and the colours and handed over to their Honors. Whereupon the late Mayor John Lawrence being sent for, the same is communicated to him, who also undertook to do it. They further report, that the Burgomasters shall succeed as Burgher Captains and that they with the Schepens are authorized to elect their Lietenants and Ensigns.

This date also a beginning is made to swear in the Burghers and inhabitants.

The late Mayor reappearing in Court delivers up his gown or cloak with the City Seal and Mace and the remainder of the gowns and Constables staves are in like manner brought and fetched into the fort by the express order of the Commanders, except the two Burgher flags, which remain with the Commanders’ consent, as Burgomaster van Brugh’s.”

This completes the formal taking over of the English territory by the Dutch, and the Court records again resume routine entries such as “ plaintiff demands three ankers of rum for sheep sold — The argument of parties being heard the Worshipful Court condemns the defendant to pay the said debt to plaintiff.”

This routine business of the court, however, was again interrupted before the year was ended by another change of allegiance. Without any preliminary introduction, and without any comment, under date of October 15, 1674, stands the entry : —

“ The Governor-General appearing in Court states, that he has now received by the National Ship the *Muyll Tromp* letters and absolute orders from the Majores and their High Mightinesses for the restitution of this Province of N. Netherland to his Majesty of Great Britain pursuant to the Treaty of Peace concluded on the . . . February last ; with further orders that he return home with the garrison as soon as possible, which his Honor resolved to

communicate to the Court ; informing them further, that if they had any representation to make to their High Mightiness, it would be willingly presented by his Honor etc. For which offer the W. Court hath thanked the Governor."

With undisturbed calm the Court returned to its usual business, and not only heard at length the reasons which the Curators of the estate of John Ryder advance for not paying the Vendue-master the arrears long overdue on a house and lot "in the Brouwer Straet," but passed on to other petty disputes as if no great affairs of state had ever troubled it. On October 30th, after the Court had disposed of some fifteen cases, the Honorable Governor General again appeared and recommended "the Burgomasters and Schepens and the Burgher Council of War most particularly to take good care for the prevention of all mischiefs either by night or by day, which may be occasioned by the malice of any persons and the insolence of his Honors soldiery ; further enjoining on them, that if any soldiers be found in the streets exhibiting insolence, that they should be secured and brought to his Honor, who then should punish them according to deserts, etc." Whereupon the Court passed resolutions for measures to prevent such "mischiefs" and adjourned.

The next day the "Burgomasters and Schepens with the Council of War being assembled at the City Hall have, with the approbation of the Governor, appointed and qualified, as their Worships do hereby appoint and qualify, Mr. Cornelis Steenwyck, with the Burgomaster Johannes van Brugh and Willem Beeckman to repair on board his Majesty's frigate now anchored under Staten Island and there to welcome the Governor Majr Andrews and at the same time to request some privileges for the advantage of the Commonalty.

The above delegates returning this day report that they had welcomed the Honorable Major Andrews on board, and had sought some privileges in favour of the inhabitants ; he answered them, they, the delegates, may insure the inhabitants of the Dutch nation, that they should participate in the same privileges with those of the English nation, and that his Honour should promote their interest as much as possible ; referring further to the instructions given him by his Royal Majesty and Highness of York."

Following this the records of the Court of Burgomasters and Schepens of New Orange are brought to an abrupt close by this entry :—

"At a Court present the Burgomasters and Schepens and Burgher Council of War, held and assembled by special order of the Governor General, Anthony Colve, in the City Hall of the City of N. Orange the 9th November Stilo Novo A. 1674.

The Governor General appearing in Court communicated to it that he should, pursuant to the orders from his superiors, deliver over tomorrow the Fort and this Province of N. Netherland according to the Articles of Peace to Major Andrews in behalf of his Majesty of Great Britain; and thanked the Court thereupon for their past services and at the same time absolved and discharged from their oath of allegiance to their High Mightinesses and his Serene Highness; further ordering, that the five flags of the Outside People with the cushions and table cloth now in the City Hall should be taken in charge by the Burgomaster Johannes van Brugh, until they should be demanded and taken away by order of the supreme authority, taken thereupon his departure from the Court. Which I certify to have so occurred,

EPHRAIM HERMAN, *Secretary.*"

## II. CHANGES IN LAWS.

Although each change of allegiance in New York necessarily carried with it a more or less complete alteration of the judicial system, yet each time the conquering nation used such discretion in dealing with the existing conditions that in no instance was there an interruption of the administration of justice.

In 1664, when New Amsterdam was surrendered to the English, it was not regarded as the conquest of a foreign country. The legal advisers of Charles II. based the English title to this territory on the rights acquired by the discovery of the North American coast by the Cabots.<sup>1</sup> The Dutch settlers in New Amsterdam were regarded as mere usurpers, who "as private persons and without any authority from their superiors and against the law of nations, and the good intelligence, and alliance between us and their superiors, invaded and have since wrongfully obtained the same to the prejudice of our crown and dignity."<sup>2</sup>

While the Dutch were in actual possession of New Netherlands, in 1664, King Charles II. granted as part of the English territory unto his "Dearest brother James Duke of York his heirs and

<sup>1</sup> *Martin v. Waddell*, 16 Pet. 367 at 409; *Mortimer v. N. Y. El. Ry. Co.*, 6 N. Y. Sup. 898.

<sup>2</sup> Private instructions to the Commissioners, 3 Documents Relating to the Colonial History of N. Y. 57.

assigns" "that island or islands commonly called by the several name or names of Matowacks or Long Island situate lying and being towards the west of Cape Cod and Narrow Higansetts abutting upon the main land between the two rivers there called or known by the several names of Connecticut and Hudson River together also with the said river called Hudson River and all the land from the west side of Connecticut to the east side of Delaware Bay and also all those Islands called or known by the names of Martin's Vineyard, and Nantukes otherwise Nantucketts," and gave him full power and authority "to correct, punish, pardon, govern and rule all such subjects of us our Heirs and successors who may from time to time hereafter inhabit within the same according to such laws, orders, ordinances, directions and instruments as by our said Dearest brother or his assigns shall be established. — So always as the said statutes, ordinances and proceedings be not contrary to but as near as conveniently may be agreeable to the laws, statutes and governments of this Our Realm of England, and saving and reserving to us our Heirs and successors the receiving, hearing and determining of the appeals of all persons." He also provided that "it shall be lawful to and for our said Dearest Brother his heires and assigns," "to make, ordain and establish all manner of orders, laws, directions, instructions, forms, and ceremonies of government and magistracy fit and necessary for and concerning the Government of his territories and islands so always as the same be not contrary to the laws and statutes of this Our Realm of England but as near as may be agreeable thereunto."<sup>1</sup>

When, therefore, Sir Richard Nicoll took possession of New Netherlands it was merely considered as the assertion of authority by the Duke of York over British territory. By the fundamental principles of the common law, the laws of England were already in force in New York.<sup>2</sup> Theoretically, therefore, the English common law became operative the moment the English authorities were in control. Indeed, an eminent judge has said that the Royal charter to the Duke of York "absolutely deprived the Duke of the power of retaining the laws of the ancient Dutch settlers, and thereby the laws of England then in force *ipso facto* became those of the colony immediately upon the surrender of the Dutch."<sup>3</sup> As

<sup>1</sup> 3 Doc. Rel. Hist. N. Y. 295.

<sup>2</sup> *Blankard v. Galdy*, 2 Salk. 411; Memo. of Aug. 9, 1722, 2 P. Wms. 75; *Calvins Case*, 7 Rep. 17; *Advocate General v. Rame Surnomoye Dossee*, 2 Moore P. C. (N. S.) 22; *Bogardus v. Trinity Church*, 4 Page 178; *The Canal Appraisers v. The People*, 17 Wend. 571.

<sup>3</sup> Chancellor Walworth in *The Canal Appraisers v. The People*, 17 Wend. 571 at 587.



a matter of fact, however, as we have seen, the Dutch courts went on as if perfectly oblivious of the change of sovereignty.

No immediate attempt was made by the English to supersede the existing Dutch civil law.<sup>1</sup>

It was not until four months after the surrender that the first move in this direction was made. Governor Nicolls prepared a code of law and practice<sup>2</sup> and invited delegates chosen from the various towns to meet at the end of February at Hempstead. When they had met at the appointed place, without giving the delegates an opportunity for debate or discussion, he presented them with his "General Laws Hereafter to be Observed," which he forced them to adopt. Much more unwillingly than their language indicates the Code was accepted:—

"Wee the Deputies duely elected for ye severall townes upon L. Island being assembled at Hempsteed in a generall meeting by authority derived from your R. H<sup>ie</sup> unto the Hon<sup>ble</sup> Collonel R. Nicolls as deputy Governour doe most humbly and thankfully acknowledge to y<sup>r</sup> R. H<sup>ie</sup> the great honour and satisfaction wee receive in our dependence upon your Royall Highness according to the tenour of his sacred Ma<sup>ties</sup> Patent granted to Y<sup>r</sup> R. H<sup>ie</sup> bearing date the 12 day of March 1664 in the 16th yeare of his Maties Raigne, wherein wee acknowledge ourselves, our heires and successors for ever to be comprized to all intents and purposes therein more at large exprest, and wee doe publikely and unanimously declare our cheerfull submission to all such Lawes, Statutes and Ordinances which are or shall be made by virtue of authority from Y<sup>r</sup> R. H<sup>ie</sup> your heires and successors forever. . . . Wee being already well assured that in soe doing wee performe our duty of allegiance to his Ma<sup>tie</sup> as free borne subjects of the Kingdome of England inhabiting in these his Maiesties dominions." <sup>3</sup>

Governor Nicoll's code, commonly known as the "Duke's Laws,"<sup>4</sup>

<sup>1</sup> Letter, Col. Cartwright to Sir R. Nicolls, 3 Doc. Rel. Col. Hist. N. Y. 87-8.

It must also be remembered that the Articles of Surrender guaranteed to the Dutch settlers their customs concerning inheritance, enjoyment of their property, and the disposal of the same at pleasure, the determination, according to Dutch manner of differences, of contracts and bargains made before the capitulation, and other similar rights.

<sup>2</sup> Judge Daly believes that the Code was prepared by Clarendon, then Lord Chancellor, and prints a note from Dr. O'Callaghan expressing a similar opinion. 1 E. D. Smith Rep. xxxx.

<sup>3</sup> 3 Doc. Rel. Col. Hist. N. Y. 91.

<sup>4</sup> "Lawes Establisht by the authority of his Majesties Letters patents, granted to his Royall Highness James Duke of Yorke and Albany: Bearing Date the 12th day of March in the 16th year of the Raigne of our Sovereigne Lord Kinge Charles the Second." 1 N. Y. Hist. Soc. Col. 305. 1 Colonial Laws of N. Y. 6.

was largely borrowed from the laws in practice in the other English colonies in New England.<sup>1</sup> Arranged in alphabetical order are all the details establishing and regulating the administration of justice and government. Three divisions of courts are established, the courts of Assizes, courts of Session, and the city and town courts. Each court has both civil and criminal jurisdiction. Judges, sheriffs, justices of the peace, juries, and arbitrators are all provided for. Land tenure, police regulations, provisions for religious liberty, and taxes are all explicitly set forth. There is almost no reference to the mode of procedure or to the then existing Dutch laws.

However, it was not until the following June that Sir Richard took the final step to overthrow the old Dutch system.

On Tuesday, June 13, 1665, "The Honble Heer Governour Nicolls appears in the Assembly who delivered to the Court the following writings after he had them read by the Clerk of the Secretary Nicolls :—

'Revocation of the FForme of Gevernment of New Yorcke Under Y<sup>e</sup> Style of Burgomast<sup>rs</sup> and Schepens.

By vertue of his Ma<sup>ties</sup> Letters Pattents bearing date the 12th day of March in the 16th yeare of his Ma<sup>ties</sup> Reigne, Granted to his Royall Highness, James Duke of Yorke wherein full and absolute Power is given and Granted to his Royal Highnesse or his Deputyes, to Constitute, appoint, revoke and discharge, all Officers both Civill and Military, as also to alter & Change, all Names and Styles fformes or Ceremonyes of Government ; To the end, that his Ma<sup>ties</sup> Royall pleasure may bee observed and for the more Orderly establishment, of his Ma<sup>ties</sup> Royall Authority, as near as may bee Agreeable to the Lawes and Customes of his Ma<sup>ties</sup> Realme of England ; Upon mature deliveracon and advice, I have thought it necessary to Revoke and discharge, And by these p<sup>re</sup>sents in his Ma<sup>ties</sup> name, do Revoke and discharge the fforme and Ceremony of Government of this his Ma<sup>ties</sup> Towne of New Yorke, under the Name or Names, Style or Styles, of Scout Burgomasters and Schepens ; As also, that for y<sup>e</sup> future Administracon of Justice, by the Lawes Establisht in these the Territoryes of his Royall Highnesse wherein the Welfare of all the Inhabitants and the Preservacon of all their due Rightes and Priviledges, Graunted by the Articles of this Towne, upon Surrender under his Ma<sup>ties</sup> obedience, are concluded ; I do further declare, That by

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<sup>1</sup> Order to put the Duke's Laws in force in N. Y., 3 Doc. Rel. Col. Hist. N. Y. 226.



a Particular Commission, Such Persons shall be Authorized to putt the Lawes in Execucon, in whose abilityes, Prudence and good Affection to his Ma<sup>ties</sup> Service, and ye Peace and happynesse of this Governm<sup>t</sup>. I have especially reason to put Confidence, which persons so Constituted and appointed, shall bee Knowne and Called by y<sup>e</sup> Name and Style of MAYOR, ALDERMEN AND SHERRIFFE, according to the Custome of England in other his Ma<sup>ties</sup> Corporacons; Given under my hand and Seale, at ffort James in New Yorke, this 12th day of June 1665.

RICHARD NICOLLS.'"<sup>1</sup>

For nine years there was no interruption to routine administration of the Duke's Laws in New York. In 1673 the Dutch conquest naturally overthrew all the British institutions, and the "laws and statutes of our Fatherland" became again the law of the land in New York. The change of law was made as quickly and as quietly as the change of allegiance.<sup>2</sup> Indeed, there was so little friction caused by the shifting from the English to the Dutch system of jurisprudence that the Courts were in full discharge of their functions when, fourteen months after the Dutch succession,<sup>3</sup> Sir Edmund Andros returned to New York to restore the English régime. He had express instructions "to put in execution such lawes rules and ord'rs as you find have been established by Coll. Nicolls and Coll. Lovelace, and not to vary from them but upon emergent necessities . . .," and, "to continue ye courts of justice as they have been established and used hitherto."<sup>4</sup>

November ninth, 1674, Governor Andros by proclamation restored to New York the common law: "It is hereby further declared that the Known Books of Laws formerly estabisht and in force under his Royall Highnesse government is now again confirmed by his Royall Highnesse the which are to be observed

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<sup>1</sup> 5 Records of New Amsterdam 248.

<sup>2</sup> As early as January, 1674, Anthony Colve, as Governor General, issued "Provisional Instructions for the Schout, Burgomasters and Schepens of the City of New Orange regulating the practice and procedure of the Court." This is frequently referred to as "Colve's Charter." 7 Records of New Amsterdam.

<sup>3</sup> The Treaty of Westminster, February 19, 1674, provided for the surrender of New York to the English by the Dutch.

<sup>4</sup> Instructions to Andros, 3 Doc. Rel. Col. Hist. N. Y. 218. Under date of August 6th an order had issued to Sir Edmund "to put the Dukes Laws in force in New York," "except such as shall have apparent inconveniences in them." 3 Doc. Rel. Col. Hist. N. Y. 226.

and practiced together with the manner and time of holding courts therein menconed as heretofore. And all magistrates and civill officers belonging thereunto to be chosen and estabisht accordingly." <sup>1</sup>

*Lee M. Friedman.*

BOSTON, MASS.

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<sup>1</sup> Proclamation of Gov. Andros, 3 Doc. Rel. Col. Hist. N. Y. 227.

## BANKRUPTCY A COMMERCIAL REGULATION.

**A**MONG the causes which led to the formation of the Federal Constitution, the inherent weakness of the Confederation has been usually advanced as the primary one for the establishment of a stronger central government. An examination of the causes, which resulted in the formation of a nation, instead of a league, will reveal how important a part the subject of commerce played in the purposes of the framers of the Constitution. On the 21st day of January, 1786, the Legislature of Virginia passed the following resolution :—

*“ Resolved, that Edmund Randolph, James Madison, Jr., Walter Jones, St. George Tucker, and Meriwether Smith, Esquires, be appointed Commissioners, who, or any three of whom, shall meet such Commissioners as may be appointed in the other States of the Union, at a time and place to be agreed on, to take into consideration the trade of the United States ; to examine the relative situations and trade of said States ; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony ; and to report to the several States such an act, relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress effectually to provide for the same.”*

Pursuant to this resolution, the Commissioners assembled at Annapolis in the following September, but delegates from five States only were present. Under the circumstances of this partial representation, the Commissioners did not deem it advisable to proceed with their commission, but resorted to a draft, framed by Alexander Hamilton, of a recommendation to the various States, a part of which was as follows :—

*“ In this persuasion, your Commissioners submit an opinion, that the idea of extending the powers of their Deputies to other objects than those of commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention. They are the more naturally led to this conclusion, as, in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the Federal Government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a corresponding adjustment of other parts of the Federal system.”*

The draft concluded with the suggestion of the Constitutional Convention, which by sanction of Congress was afterwards convened in May, 1787. In this connection the following observations of Mr. Justice Miller in his "Memorial Oration," September 17, 1887, are pertinent:—

"It is not a little remarkable that the suggestion which finally led to the relief, without which as a nation we must soon have perished, strongly supports the philosophical maxim of modern times,—that of all the agencies of civilization and progress of the human race, commerce is the most efficient. What our deranged finances, our discreditable failure to pay our debts, and the sufferings of our soldiers could not force the several States of the American Union to attempt, was brought about by a desire to be released from the evils of an unregulated and burdensome commercial intercourse, both with foreign nations and between the several States."

And again:—

"It is a matter for profound reflection by the philosophical statesman, that while the most efficient motive in bringing the other States into this convention was a desire to amend the situation in regard to trade among the States, and to secure a uniform system of commercial regulation, as necessary to the common interest and permanent harmony, the course of Rhode Island was mainly governed by the consideration that her superior advantages of location, and the possession of what was supposed to be the best harbor on the Atlantic coast, should *not* be subjected to the control of a Congress which was by that instrument expressly authorized 'to regulate commerce with foreign nations and among the several States.'"

It may therefore be truly said that just as the Zollverein was the foundation of the present German Empire, so commerce proved to be one of the corner-stones of the Constitution. To be sure the framers of the Constitution were conversant with Shays' Rebellion in Massachusetts, and in the spirit of the Preamble to the Constitution, which looks to the establishment of justice and the promotion of the general welfare, may have had in mind the regulation of the relation between debtor and creditor. At the same time, inasmuch as bankruptcy was known to be a measure primarily for the benefit of creditors, its origin is undoubtedly to be traced rather to commercial reasons than to those for the relief of the debtor class. This is apparent from the subsequently quoted remark made by Mr. Roger Sherman, who had in mind the drastic provisions of the English system, which certainly present a marked contrast to the latter-day view of many who seem to regard bank-

ruptcy as a measure for the relief of poor debtors and as a sort of eleemosynary institution.

An examination of the origin of the bankruptcy clause in the Constitution will show that this subject was akin to or closely related to commerce. It is interesting to note that the fathers of bankruptcy legislation in this country were Rutledge and the Pinckneys of South Carolina. The distinguished statesmen of South Carolina, including the Pinckneys, had visited England, where it was the custom in those days for gentlemen of fortune and family to receive their education. Both the Pinckneys and Rutledge had been trained at the Temple. Undoubtedly the two Pinckneys who were members of the Constitutional Convention had acquired an intimate knowledge of bankruptcy from the English system. A reference to Madison's "Journal of the Constitutional Convention" will show that Mr. Pinckney moved to commit Article 16, which was the "full faith and credit clause" of the Constitution, with the following proposition: "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange;" thus showing that at that early date he regarded bankruptcy as a part of the law merchant, or a regulation of commerce. On September 1, 1787, Mr. Rutledge, afterwards Chief Justice, reported for the Committee which considered this subject that the provision "to establish uniform laws on the subject of bankruptcies" should be incorporated with the provision where it now stands relative to a uniform rule of naturalization. On Monday, September 3, 1787, when the subject was reached for discussion, the following observations were made:—

"Mr. (Roger) SHERMAN (of Connecticut) observed, that bankruptcies were in some cases punishable with death, by the laws of England; and he did not choose to grant a power by which that might be done here. Mr. GOUVERNEUR MORRIS said, this was an extensive and delicate subject. He would agree to it because he saw no danger of abuse of the power by the Legislature of the United States. On the question to agree to the clause, Connecticut alone was in the negative."

Such is the history of the origin of bankruptcy in the Constitutional Convention.

In the 42d number of the "Federalist," the remarks of Mr. Madison, who took so prominent a part in the debates in the Constitutional Convention, have also a pertinent significance as to the intimate relation between bankruptcy and commerce:—

"The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states, that the expediency of it seems not likely to be drawn into question."

In this connection a brief glance at the English origin and history of the bankruptcy system (*die Urquellen*) will also show its intimate relationship to trade and commerce. Judge Taft, delivering the opinion of the Circuit Court of Appeals in the case of *Leidigh Carriage Co. v. Stengel*,<sup>1</sup> explains that the first bankruptcy act was passed in England during the reign of Henry VIII.; that its early provisions were confined to traders; and its original purposes were to prevent the fraudulent dealings of debtors. It is a historical fact that there also existed in England, concurrently with bankruptcy legislation, insolvent laws — the so-called "Lord's Acts," and Relief of Insolvent Debtors Acts — for the benefit of non-traders, and this was the case until the distinction between insolvency and bankruptcy was abolished in 1861, at which time the two systems, owing to the universal drift of humanitarian legislation in the abolition of imprisonment for debt, were merged. *Cessante ratione cessat ipsa lex*. The distinction between an insolvency law and a bankrupt law has been held to consist in the fact that an insolvency law did not release the effects present or future of the debtor, but only his person, and that such laws could be invoked only on voluntary petitions, while a bankruptcy law had the effect of releasing both the person of the debtor from debt and his effects.

It is a mistake to assert that bankruptcy is as old as the Romans. The *Cessio Bonorum* bears more resemblance to an insolvency law, as its effect was to release the debtor's person but not his property from execution by creditors.

Turning now to America, it may be in order, as a preliminary to the consideration of congressional legislation, to refer to the two leading cases on the subject of bankruptcy in the United States, to wit; *Sturgis v. Crowninshield*,<sup>2</sup> and *Ogden v. Saunders*,<sup>3</sup> in which opinions were rendered by Chief Justice Marshall, and which are essential to a thorough understanding of the American system of bankruptcy legislation. In *Sturgis v. Crowninshield*, the court points out the distinction between insolvency and bankruptcy laws, and in its opinion, which was delivered in 1819, speaks as follows: —

<sup>1</sup> 95 Fed. Rep. 637, 646.

<sup>2</sup> 4 Wheat. 122.

<sup>3</sup> 12 Wheat. 213.

“But if an act of Congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying that this was an insolvent, not a bankrupt act; and, therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of Congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying, that the law was unconstitutional, and the commission a nullity.”

In *Ogden v. Saunders*, which decided that State insolvent laws were valid but had no extra-territorial or interstate effect, the Chief Justice said:—

“Yet, when we consider the nature of our Union, that it is intended to make us, in a great measure, one people, as to commercial objects; that, so far as respects the intercommunication of individuals, the lines of separation between States are, in many respects, obliterated; it would not be matter of surprise if, on the delicate subject of contracts once formed, the interference of state legislation should be greatly abridged or entirely forbidden. . . . The power of changing the relative situation of debtor and creditor, of interfering with contracts, — a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, — had been used to such an excess by the state legislatures as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise as well as the virtuous of this great community, and was one of the important benefits expected from a reform of the government.”

The first bankruptcy act of 1800, undoubtedly copied from the English statutes, related to *traders* only, and was passed at a time when a voluntary petition was unknown. The Act of 1841 contains the first enactment of a voluntary system, but when the quotation from the Supreme Court is borne in mind, it is to be noted that as early as 1819 the *dictum* of the Chief Justice had announced that such a voluntary provision could not be regarded as any the less a bankrupt law or unconstitutional. A reference to the “Life of Thomas H. Benton,” written by President Roosevelt, will also show that Benton antagonized the passage of the Act of 1841, on the ground that it was not a bankruptcy law, but was an insolvency



law, and, therefore, unconstitutional. In this connection the dissenting opinion of Mr. Justice Catron in the case of *Nelson v. Carland*<sup>1</sup> affords much valuable information as to the constitutional origin of bankruptcy legislation.

Before alluding to the various theories, a word as to definition may be appropriate. The term bankruptcy, derived from *banco rotto* — a merchant whose table or counter of business is broken up — is neither euphonious nor euphemistic. The Germans have a happier designation in *Concurs* for the condition and *Concursverfahren* for the proceedings, which since 1877 have been regulated by an Imperial Code (*Concursordnung*).

Professor Richard Brown, in an excellent article on "Comparative Legislation in Bankruptcy," in the August, 1900, number of the "Journal of the Society of Comparative Legislation," asserts that three theories have been advanced as to the objects of bankruptcy legislation : —

"(1) The punishment of the fraudulent debtor ; (2) the reinstatement of the unfortunate but innocent debtor ; or (3) the equitable distribution of the insufficient assets among all the creditors."

Both in England and the United States there has been a great departure from the primitive theory, notwithstanding this seems to have been uppermost in the mind of Mr. Roger Sherman when the subject was discussed in the Constitutional Convention. In England the theory — one which, it is submitted, is the only sound theory — still prevails that the true functions of bankruptcy are administration and distribution. Mr. Chamberlain, who has been sometimes quoted as an opponent of bankruptcy legislation, in introducing the English Act of 1883 stated the two leading objects of bankruptcy to be " (first) the improvement of the tone of commercial morality and the promotion of honest trading, and (second) the fair and speedy distribution of the assets among the creditors whose property they are." "What is the object of a bankruptcy law?" asked the Attorney-General of England in introducing the English Bill of 1869. "The object," he answers, "is to collect the proceeds of the estates of bankrupts, and to distribute them among the creditors as fairly, cheaply, and speedily as possible."

In America, unfortunately, bankruptcy has come to be regarded as a sort of poor-debtor law, as a species of clearing house for the liquidation of debt, or, as some have expressed it, a "Hebrew Jubilee," whereby the people at intermittent periods receive eman-

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<sup>1</sup> 1 How. 265, 280.



cipation from their debts, are rehabilitated, and the "dead wood" of the community is thereby eliminated. That the rehabilitation theory was farthest from the minds of the framers of the Constitution, it has heretofore been attempted to be shown.

It is now proposed to demonstrate that the true functions of bankruptcy are administration and distribution, and that sound statesmen and legislators in Congress have ascribed to the regulation of commerce the true reason for bankruptcy legislation. *Contemporanea expositio est optima et fortissima in lege.* This maxim that a contemporaneous interpretation is the best and most powerful in the law, is as useful in the interpretation and construction of statutes as it was in the days of Lord Coke; and it is always legitimate in seeking for the reason of legislation to consider the history of the times and the causes which operate to demand legislation. An examination, therefore, of the debates in Congress and the history and origin of our four bankruptcy acts will reveal that commerce and its regulation have been among the foremost arguments advanced by statesmen for the enactment of a system which means to the creditors administration, to the merchants a uniform system of law, and incidentally to the debtor a release from his obligations.

After the organization of the general government, the question of bankruptcy legislation became an early subject of consideration in Congress; but the measure encountered violent opposition on the part of the planter class, and so distinguished a man as Albert Gallatin opposed it in the Fifth Congress on the ground that the country, being composed largely of the agricultural element, was not adapted to it, although he admitted the principle of equality, and conceded that such a system might produce good results in the great cities. It is to be borne in mind that at this period the law governing the English system was limited to traders. James A. Bayard of Delaware, the ancestor of a distinguished family of statesmen, was an ardent champion of bankruptcy legislation at this time, and ably answered the argument of Gallatin. On January 15, 1799, Mr. Bayard spoke in the House as follows:—

"The necessity of a bankrupt law results wherever a nation is in any considerable degree commercial. No commercial people can be well governed without it. Wherever there is an extensive commerce, extensive credits must be necessarily given."

He further spoke of the fact that such legislation prevented fraudulent speculation, and that it would be a great hardship for a merchant, losing his ships in trade, to be so situated that he could not compromise with his creditors, and asserted:—

"That England for more than two centuries and a half had been the most flourishing commercial country upon the face of the earth, owing to her civil policy, the essential part of which was the bankrupt system ; and that no nation in the world has been able to extend its credit so far as Great Britain."

In the same session is to be found a remarkable speech by Harrison Gray Otis of Massachusetts, in which he shows the disadvantages arising from the chaos of different administrative laws. In the same Congress Bayard is to be found ably supported by John Marshall, who was then a member of Congress, the latter speaking in opposition to an amendment directed against the supposed *ex post facto* effect of such a law. In the roll call in favor of bankruptcy laws were included such memorable names as James A. Bayard of Delaware, Edward Livingston of New York, John Marshall of Virginia, Harrison Gray Otis of Massachusetts, James Pinckney of Maryland, John Rutledge, Jr., of South Carolina, Samuel Sewall of Massachusetts, and the Speaker, Theodore Sedgewick of Massachusetts, by whose "yea" vote the tie was broken.

After the passage of this first act, which was a purely involuntary law and limited in its scope, being intended for traders only, violent opposition to its continuance was aroused by John Randolph of Virginia, who bitterly assailed it, on the ground it was an *ex post facto* law, impaired the obligation of contracts, and was an injury to the planters of the country. To him is to be attributed its repeal. This law was not given a fair trial, and would undoubtedly have furnished general satisfaction to the mercantile classes had it not met with so untimely an end. On February 18, 1803, in the Seventh Congress, James A. Bayard spoke as follows : —

"The commercial world cannot exist without such an act. Its necessity arises from the nature of trade, and does not belong to other classes of citizens. It is founded on the principle that commerce is built on great credits ; and great credits produce great debts. Owing to the risks arising from these and other circumstances, the most diligent and honorable merchant may be ruined *without committing any fault*. Not so as to the other classes of citizens ; either the cultivators of the soil, the mechanics, or those who follow a liberal profession. They live on the profits of their labor, not on profits derived from credit. . . . These circumstances make a bankrupt law necessary to the merchants. The insolvent law is an ample provision for others."

And, further, he said :—

“ I believe as the United States are one great commercial Republic, it behooves us to have one uniform rule coëxtensive with the Union, that the merchant in New Hampshire may know the laws of Georgia.”

The subject of bankruptcy was again revived in 1815 in the Thirteenth Congress, and was pretty actively considered from that time onward. In the Fifteenth Congress, on February 25, 1818, Mr. Whitman of Massachusetts delivered a speech in which he showed the great risks incurred by merchants in trade, and that failures were occasioned by *causes beyond their control*, and emphasized the necessity of one code for merchants throughout the entire country, dwelling upon the chaos of State regulations, local preferences, and the consequent impairment of confidence, and further said :—

“ The prosperity of *farmers* was dependent upon that of the *merchant*, and that fraud was encouraged by the absence of a bankruptcy law.”

In a draft of a bill pending in the Seventeenth Congress is to be found the first appearance of a voluntary bankruptcy provision, which was evidently derived from the remark of the Chief Justice in the above mentioned case of *Sturgis v. Crowninshield*. At this time John Sergeant of Philadelphia appeared upon the scene as a champion, equally able with Bayard, in favor of bankruptcy legislation, and delivered speeches which completely demolished the opposition advanced in the statements of Basil Montague of England, and which adverse arguments were also effectively answered in speeches of Senator Harrison Gray Otis of Massachusetts.

The next great enemy of bankruptcy legislation to appear upon the forum of debate was James Buchanan, whose famous speech against it was delivered at this session, and who, with the assistance of Randolph's opposition, succeeded in defeating any legislation. On May 26, 1824, in the Eighteenth Congress, Daniel Webster of Massachusetts offered in the House a resolution in favor of a bankruptcy law, as opposed to “ twenty-four different and clashing systems,” and on March 3, 1825, spoke as follows :—

“ He remained fully of opinion that, in a country so commercial, with so many States, having almost every degree and every kind of connection and intercourse among their citizens, true policy and just views of public utility required that so important a branch of commercial regulation as bankruptcy, ought to be uniform throughout all the states, and, of course, that it ought to be established under the authority of this Government.”

On December 6, 1825, President John Quincy Adams recommended the passage of a bankruptcy law in his message, and speaks of it as "an object of the deepest interest to society." Another champion of bankruptcy legislation appeared upon the scene in the Nineteenth Congress in the person of Senator Hayne of South Carolina, who on February 21, 1826, in reporting a bill, said : —

"The evils, however, resulting from the inefficient and contradictory laws now of force in the several States on this subject, were so severely felt; — such were the frauds to which they gave rise, and so great the injustice practised under them; that the committee were strongly impressed with the belief that some effectual remedy ought, at least, to be attempted."

In this bill reported by Senator Hayne were incorporated the changes of the new English (1825) Codification or Revision of the Bankruptcy laws. It was chiefly applicable to mercantile classes, but had engrafted upon it the voluntary petition for the benefit of non-traders. In this session Senator Hayne was also ably supported by Senator Berrien of Georgia.

Mr. Justice Story in his "Commentaries on the Constitution," published in 1833, remarks : —

"It is extraordinary that a commercial nation, spreading its enterprise through the whole world, and possessing such an infinitely varied internal trade, reaching almost to every cottage in the most distant States, should voluntarily surrender up a system which has elsewhere enjoyed such general favor as the best security of creditors against fraud, and the best protection of debtors against oppression."

In the Twenty-fifth Congress, Senator Thomas H. Benton of Missouri came forward as an opponent in opposition to the recommendation of President Van Buren in his message to Congress in favor of such a law. Benton's opposition, as explained by President Roosevelt, was based not so much on hostility to bankruptcy as to the nature of the Act of 1841, which he designated as an insolvency rather than a bankruptcy law. In fact, in a speech on March 4, 1840, he had spoken in favor of applying a bankruptcy law to corporations and banks. Among the advocates of the system in the Senate of the Twenty-seventh Congress are to be found the names of such distinguished statesmen as Berrien of Georgia, Rufus Choate of Massachusetts, Henry Clay of Kentucky, and Clayton of Delaware; and opposed to it such names as Richard H. Bayard of Delaware, Benton of Missouri, Buchanan of Pennsylvania, Calhoun of South Carolina, Pierce and Woodbury of New Hampshire; in the House, the names of such illustrious members

as John Quincy Adams, Caleb Cushing, and Robert C. Winthrop of Massachusetts, William P. Fessenden of Maine, and Thomas C. Chittenden of New York in favor; and that of Nathan Clifford of Maine in opposition. On July 1, 1841, President Tyler in a special message recommended the passage of a bankruptcy law. The Act of 1841, said to have been drafted by Mr. Justice Story, was the result of bargains and log-rolling, and from its inherent defects was soon repealed. At the time the Act was repealed, Senator Buchanan, on February 25, 1843, made a notable speech, recanting his views as to its unconstitutionality, and totally disagreeing with Benton's narrow views of the Constitution. It is noteworthy that in President Buchanan's message to the Thirty-fifth Congress, on December 8, 1857, he recommended the passage of a uniform bankrupt law applicable to all the banking institutions throughout the Union.

From the repeal of the Act of 1841 until the breaking out of the Civil War no bankruptcy legislation was secured. At this stage it may be stated as an interesting historical fact that the Constitution of the "Confederate States of America" also contained a clause in favor of bankruptcy legislation, with this addition, however: "But no law of Congress shall discharge any debt contracted before the passage of the same." During the period of the Civil War, Roscoe Conkling came forward as a friend of bankruptcy legislation, and on July 15, 1861, moved the appointment of a Committee of Five to report a bankruptcy law at the next session. The passage of such a law was not accomplished, however, until the Thirty-ninth Congress, when Thomas A. Jenckes of Rhode Island reported a bill, of which he was the author, and designated it as a "regulation of commerce." In this same session Senator William M. Stewart of Nevada advocated its passage on the ground of its benefit to commercial men.

The panic of 1873, which started soon after the failure of Jay Cooke, led to a discussion of the existing bankruptcy act, although up to that time no particular fault had been found with its provisions by the merchants of the country. President Grant, in his message of December 1, 1873, recommended a modification of the involuntary clause relating to the suspension of commercial paper as a ground of bankruptcy. This recommendation was followed by the passage in 1874 of a compromise amendment, which, while it materially weakened the involuntary features of the law, gave the country for the first time the very excellent provision as to composition, which marks a distinct advance in bankruptcy legis-

lation, and serves as a dignified method of settlement whereby an honest merchant overtaken by embarrassments usually beyond his control may, by the consent of a majority of his creditors, compound his debts, preserve the good-will and continuance of a business often built up by the efforts of a lifetime, and thus resume an honorable position in mercantile life. The causes which led to the repeal of this act, which had remained upon the statute books eleven years, and much longer than its two predecessors, were certain inherent defects, great delays, and extravagant fees paid to officials. An examination of the debates in the Forty-fifth Congress, which repealed the Act of 1867, still further discloses the vigorous protests against leaving a commercial nation without permanent legislation. Senator Stanley Matthews, who afterwards became a Justice of the Supreme Court, in the discussion of the repeal bill, stated : —

“The experience of the civilized world of commercial nations, and our own experience too, establishes the fact that we ought to have a bankrupt system, and that other nations have been able to maintain a stable system of jurisprudence on this subject.”

Further, in the same debate, he said : —

“No more important question, none affecting the interests of the community from one end of the country to the other irrespective of sections and classes, none lying more nearly at the foundation of the public weal exists or has been considered by the Senate than this very question of a proper and efficient bankrupt system. . . . Do the Senators who are urging the immediate repeal of this act flatter themselves with the idea that when it is repealed there will no longer be frauds committed by debtors against creditors? Manifest as those frauds in my opinion have been and as often as the very provisions of the law have been made to cover a retreat for them, I nevertheless venture on the prediction that the absolute and unconditional repeal of the act will be simply uncovering the box of Pandora, and instead of the frauds that can now be enumerated and carried on in the lists of bankruptcies they will be so thick and so many that they will darken the air and you cannot count them.”

In the same debate, Senator David Davis, who had been a Justice of the Supreme Court, said : —

“In a great commercial country like this a bankrupt law is an absolute necessity. With thirty-eight States of diverse insolvent proceedings a bankrupt law is an absolute necessity.”

Senator John J. Ingalls, on April 15, 1878, said : —

“My own conviction has been that a great commercial people like ours was ill-adapted to exist without a bankrupt law in some form.”



And, again, in the same debate, Senator Ingalls said :—

“It is an anomaly in civilization that a great commercial country like ours, with its thousands of millions of commerce, should remit to the conflicting decisions of State insolvent courts the question whether or not a debtor shall be relieved from the payment of his debts upon the surrender of all his assets.”

Senator Roscoe Conkling, while yielding to the instructions of his Legislature for repeal, had hoped for the rejection of the repeal bill, and recommended the appointment of a commission to suggest perfecting amendments, and said :—

“All commercial nations in recent times have adopted, and most of them after long investigation, bankrupt acts as wise components of commercial systems. . . . The American people alone, so far as I know, among the commercial peoples of the world have bankrupt laws in spasms and ways.”

Representative William P. Frye, on April 25, 1878, spoke as follows :—

“It is the constitutional duty of the Congress of the United States to enact and keep upon the statute book a bankrupt law. I hold that it is an absolute necessity to the commercial law of this land. That commercial law without it is as a man without an arm or without a leg.”

No sooner, however, had the Act of 1867 been repealed in 1878 than the merchants of the country commenced the agitation for a bankruptcy law, and the so-called “Lowell Bill” was introduced into Congress as early as 1882, and in the Forty-seventh Congress Senator George F. Hoar championed it in the following language : “Commerce and manufactures know no state lines.” President Arthur, in his second annual message of December 4, 1882, expressed a desire that Congress would act so as “to afford the commercial community the benefits of a national bankrupt law ;” and, again, in his fourth annual message of December 1, 1884, expressed a further desire for such legislation “in view of the general and persistent demand throughout the commercial community for a national bankrupt law.” On December 3, 1889, President Harrison, in his first annual message, stated “that the enactment of a national bankrupt law of a character to be a *permanent* part of our general legislation is desirable ;” and in his second annual message of December 1, 1890, observed :—

“The Constitution having given to Congress jurisdiction of this subject, it should be exercised and uniform rules provided for the administration of the affairs of insolvent debtors. The inconveniences resulting

from the occasional and temporary exercise of this power by Congress, and from the conflicting State codes of insolvency which come into force intermediately should be removed by the enactment of a simple, inexpensive, and *permanent* national bankrupt law."

In the debates in the Fifty-third Congress on the "Torrey Bill," which had been first introduced in December, 1889, Representative Nelson Dingley, Jr., said: "Such legislation is a necessary incident of domestic commerce," and further explained the short duration of prior legislation as follows:—

"In the early history of this country, before interstate commerce had been developed to the extent that it has within recent years, before the construction of railroads and telegraphs and the growth of the intimate business relations now existing between every part of this country, which makes Texas commercially as near to New York and New York as near to San Francisco as Philadelphia was to Pittsburg seventy-five years ago, we can see in the development of the means of communication a reason, a necessity for national bankruptcy legislation that did not exist fifty or seventy-five years ago. We have become a great nation commercially as well as politically. Every part of this country is commercially linked with every other part. The merchant in New England is dealing every day with the merchant in New Orleans and Galveston. The merchant in St. Paul is selling to and purchasing from the merchant of Boston every day. State lines have been broken down commercially in the progress of this nation."

On April 13, 1896, Speaker Henderson, who was then Chairman of the Judiciary Committee, submitted its report and referred to the fact that China was about the only country in the civilized world which never had had a bankruptcy law, and asked in this report the pertinent question:—

"Ought the United States to be classed hereafter with England, Germany, France, and their associates having bankruptcy laws, or continue in the class with China?"

On April 5, 1897, Senator William Lindsay of Kentucky, praised the present bankruptcy act in the following language:—

"This measure is the most thoroughly analyzed piece of proposed legislation I have ever examined. Every conceivable contingency seems to have been thought out and carefully provided for. It is my judgment, that if enacted it will be a conspicuous example of matured legislation and remain for all time as an example of how laws should be prepared before being placed upon the statute books."

From the foregoing consideration of the historical and constitutional origin of bankruptcy laws, and from this view of contemporaneous congressional debates, an endeavor has been made to prove that bankruptcy, being originally designed for merchants and



traders only, and being involuntary until the two systems of bankruptcy and insolvency became merged in America in 1841 and in England in 1861, is essentially a *commercial regulation*, and that its main objects are administration or distribution, rather than the relief of the debtor. Ex-Judge Addison Brown of New York, an able bankruptcy expert, in a decision under the present act, says :

“The object of the bankruptcy act is declared to be ‘to establish a uniform system of bankruptcy throughout the United States.’ The most fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt’s property among his creditors, and to do this by means of the agencies created by the act. That originally was its only purpose. Later, a second element has been added in the provisions for the bankrupt’s discharge, upon such terms and conditions as the act may prescribe. The present act fully provides for both of these objects.”

It is perfectly apparent, however, that there exists among some judges, on the floors of Congress and in the community, a fallacious and superficial view that bankruptcy legislation should partake of the nature of a “Hebrew Jubilee,” and that at intermittent periods the country should have such a law for the purpose of relieving the unfortunate debtor from his burden of debt. While the humanitarian or relief features are meritorious, it should be constantly borne in mind that this principle of the law is merely an incident to its main purpose, and should not prove a menace to the *permanency* of a system intended for the perpetual benefit of merchants in general. If the “Hebrew Jubilee” idea is to prevail, the country will be confronted with successive repeals as heretofore ; but as regards repeal, it is difficult to understand why a bankruptcy law should be singled out for attack. There would seem to be as much sense in asking for a repeal of the Interstate Commerce law, Patent laws, and Postal law, all of which are authorized by the same section of the Constitution, which provides for “uniform laws on the subject of bankruptcies throughout the United States.” Certainly bankruptcy legislation vitally affects the interests of the commercial and debtor and creditor classes quite as much as any of these other subjects, which do not appear to invite constant attack. If, however, the administrative or distributive function of the law is made prominent, permanency and stability — both jewels in legislation — will be the result, and thus the objects of the framers of the Constitution in securing uniformity throughout the nation in this branch of commerce will be always realized.

*James Monroe Olmstead.*

BOSTON, April 11, 1902.

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**LAW SCHOOL.** — For some time it has been proposed to build an addition to Austin Hall in order to meet the continued growth of the School, and it has now been definitely decided to extend the north wing, at a slight angle, for about seventy-five feet. In addition to the basement there will be five floors in the extension. The southern part of the lower four of these will be occupied by the new stack, which will have space for about two hundred and forty thousand volumes; the remainder of these four floors will contain eighteen desks and fourteen rooms for Professors, the Librarian's room, a room for cataloguing, and two delivery desks. Two lecture rooms will occupy the top floor, one about the size of the present North room, the other somewhat smaller than the East and West rooms. The main building will remain practically unaltered except that the space now occupied by the office and stack will be added to the reading room, thus giving about one hundred additional seats. A turret will mark the junction of the extension and the main building on the east, and an entrance on the west will lead to stairs connecting with the new lecture rooms. Work will at once be begun upon these alterations, which are expected to be completed in about one year.

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**THE RIGHTS OF CREDITORS OF A CORPORATION AGAINST A TRANSFEREE OF UNPAID STOCK.** — It has been recently held that a purchaser of stock purporting to be fully paid, who has notice that it is not in fact fully

paid, is primarily liable to creditors of the corporation for the amount remaining unpaid. *Foot v. Illinois, etc., Bank*, 62 N. E. Rep. 834 (Ill.). The subject of stockholders' liability is covered at least partially by statute in Illinois, and the court in the principal case was chiefly concerned in determining whether, as between the original subscriber and his transferee, the latter was primarily liable. See 1 STARR & CURTIS, Ann. Ill. St., 2d. ed., 1896, c. 32, §§ 8, 25. The result of the principal case, however, in holding the transferee liable, is generally followed even in the absence of a statute. *Wishard v. Hansen*, 99 Iowa, 307; 1 COOK, STOCK & STOCKHOLDERS, 3d ed., § 49. It is also generally held that a *bona fide* purchaser of stock purporting on its face to be paid up is not liable. *Brant v. Ehlen*, 59 Md. 1; *Foreman v. Bigelow*, 4 Cliff. (U. S. Circ. Ct.) 508; see *In re British, etc., Co.*, 7 Ch. D. 533; s. c. *sub nom. Burkinshaw v. Nicolls*, 3 App. Cas. 1004.

When the subscriber is still in debt to the corporation on his subscription, obviously a transferee with notice should be held liable to creditors for the amount unpaid, for he stands in the position of his transferrer by the tacit agreement of the parties. The creditor, therefore, is simply having the corporation's right enforced. See *Webster v. Upton*, 91 U. S. 65. Where, however, stock purporting to be paid up is issued in payment for property at an excessive valuation, or is issued to existing stockholders as a bonus, the question is more difficult. By the terms of his subscription the subscriber is not liable to the corporation at all. It is difficult to see, therefore, how any right which the creditor may have against him or his transferee can be worked out through the corporation. The doctrine generally advanced is the well-known and much criticised "trust fund" theory. See 25 AM. L. REV. 749. It does not seem to follow necessarily from this doctrine that the transferee is liable, unless it be considered that the individual stockholder, as well as the corporation, is in some sense a trustee. Even as regards the original subscriber, it is very difficult to point out what *res* the corporation holds in trust for the creditor, since by the terms of the contract of subscription the subscriber owes the corporation nothing, and it is even more difficult to make the stockholder a trustee. A more acceptable theory as to the subscriber's liability is that advanced in *Hospes v. Northwestern, etc., Co.*, 48 Minn. 174. It is there suggested that the true ground is fraud, in the nature of deceit: the fraud consisting in the issue of stock purporting to be fully paid up, when, in fact, it is not. A person giving credit to the corporation after such issue has either actually or presumably acted in reliance upon the representation, and should be allowed to recover by a bill in equity, analogous to an action at law for deceit. How a transferee can be held on this theory, however, it is difficult to see, since he has been guilty of no misrepresentation. One writer has boldly expressed the opinion that, since the development of the law in regard to this subject is really a process of judicial legislation, the courts really reach the result that commercial exigencies demand, and expand or contract the "trust fund" theory to suit the occasion, establishing a new status — that of stockholder — and that therefore they refuse to allow the creditors to be prejudiced by any agreement that stock shall not be paid up. 34 AM. L. REG., N. S. 448.

It would seem that not without a strain can the creditor's equity be made to attach to the stock, except upon the latter theory, and that unless it does attach, the transferee probably cannot be held. While

the fraud theory may account for the liability of the original subscriber, the broader theory is perhaps the only one which satisfactorily explains the liability of the transferee.

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THE RIGHTS OF MUNICIPALITIES AS AFFECTED BY THE STATUTE OF LIMITATIONS. — The maxim "*Nullum tempus occurrit regi*" has been adopted from England into the law of the United States. Neither the Federal government nor that of any sovereign state can be debarred by mere lapse of time from asserting its rights. *United States v. Hoar*, 2 Mason (U. S. Circ. Ct.) 311. Under a representative government a far-seeing public policy demands that public rights shall not be lost through the negligence or misfeasance of public servants. The question often arises, however, as to whether a municipality should be exempt from the operation of the statute. It seems that the proper answer must depend ultimately on how far a municipality is part of the state machinery — a political and administrative division — and how far a complete corporate entity with distinct rights and liabilities. The answer given to this query under varying circumstances will determine whether or not the statute may run against a city. To the proposition that public rights in and to highways, streets, and squares dedicated to public use cannot be lost by any length of adverse possession, there is general, but not universal, assent. See *Burbank v. Fay*, 65 N. Y. 57, 69, 70. Even where the state, and *a fortiori* the city, is by legislation subject to the statute of limitations, the courts have held that a city does not lose these rights by the lapse of the statutory period. *Hoadley v. San Francisco*, 50 Cal. 265. And where judicial legislation has not accomplished this result the law-makers have themselves provided for it. See N. H. PUB. ST. 1901, c. 77, § 7; MO. REV. ST. 1889, § 6772; VERM. ST. 1894, §§ 1220 and 1223. This trend of legislative and judicial opinion is well brought out by a recent Minnesota case. The court, acknowledging that the rule followed was "at variance with the overwhelming weight of authority and reason," felt reluctantly constrained by previous decisions to hold that the defendant by twenty years' adverse possession had acquired title to part of a public street. *City of Hastings v. Gillitt*, 88 N. W. Rep. 987. The legislature has accomplished what the court felt unable to do; first, by enacting that statutory limitations shall apply to the state, and then providing that no occupant of any public street or highway shall acquire title by reason of such occupancy. See 2 MINN. ST. § 5142; MINN. LAWS, 1899, c. 65. But the statutes not being retroactive did not govern the principal case.

On the other hand, it is general law that title to land held by a municipality for its private uses may be lost by the statutory period of adverse possession. *Evans v. Erie Co.*, 66 Pa. St. 222. But in several jurisdictions time always runs against a city, irrespective of circumstances. *Wheeling v. Campbell*, 12 W. Va. 36.

It seems that the distinction noted above is not only reasonable, but in accord with other analogies. Unquestionably municipal corporations have dual characters, public and private, in accordance with which both their power to act and their liability for damage inflicted vary. It has been argued that the same reasons for applying the maxim of "*Nullum tempus*" to the sovereign do not hold in the case of a city. The city is more compact, it is said; encroachments on public rights cannot so readily escape detection, and there are officers to prevent just such acts.

*Wheeling v. Campbell, supra.* But the other view seems more sound. The people are sovereign, and the city, after all, represents the people just as the state does; and it must be admitted that allowing adverse possession to give title would cause no less inconvenience in the case of a city street than in that of a state highway. One eminent author, in maintaining the position here set forth, has made one qualification. If a man has innocently occupied public land, and the city by its acts has led him to believe that the land is his, and its deprivation would entail great loss on him, then the city should be equitably estopped to set up its claim. DILL., MUN. CORP., 4 ed., § 675. See 15 HARV. L. REV. 737. With this exception, therefore, it seems that the purely public rights of a municipal corporation should not be barred; but that those of a *quasi* private nature should be treated like the rights of private persons or corporations.

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EFFECT OF THE ABSORPTION OF A STATE UPON ITS EXISTING TREATIES. — Much learning and ingenuity have been displayed by publicists on the interesting question of the assumption of the debts of a state or territory, when it is absorbed or ceases to hold a place in the family of nations; but the equally interesting question as to what becomes of its treaty obligations has received only passing attention.

So long as the status of the contracting parties remains the same, it would seem that a treaty once lawfully contracted by free and capable parties should continue to exist unless some period for its termination is fixed by the treaty itself, or unless there has been a breach by one party which has been acted upon by the other. When, however, one of the contracting parties changes its political status, the question of the continuance of the treaty relation is affected not only by the nature of the change in the status, but also by the nature of the treaty obligation. It would seem to be clear that when a state or territory loses all individuality as a sovereignty, and becomes incorporated into the territory of another, then the treaty obligations of the state so incorporated will end, *ipso facto*. On the other hand, where a state joins others to itself for the purpose of forming a new single state, merely changing the name and size of the original, but substantially preserving its identity, then it would seem that the treaty obligations should continue in force. Furthermore, it would appear that when a state, retaining its separate government and local law, becomes a part of a confederate state or federated union, all treaties made by that state should remain binding unless the nature of the treaty obligation is such that it could not reasonably be carried out by the state itself or by the newly formed state.

A few months ago, the Imperial German Consul at Chicago sought the arrest and commitment, under Treaty of 1852 between the United States and the Kingdom of Prussia, of a fugitive from Prussia accused of uttering forged certificates. On application for the writ of *habeas corpus* the main contention of the prisoner was that the treaty was terminated by the formation of the German Empire in 1871. The Supreme Court of the United States affirmed the order of the District Court remanding the prisoner for extradition. *Terlinden v. Ames*, 22 Sup. Ct. Rep. 484. A short ground for supporting the case is this: the question whether an executory treaty such as an extradition treaty is in force, is a political question, and on such a question the judicial department is bound by the



decision of the executive department. *Foster v. Neilson*, 2 Pet. (U. S. Sup. Ct.) 253, 314; *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149. The Executive Department of the United States Government has recognized the treaty as being in force. TREATIES AND CONVENTIONS, 921 (1889); TREATIES IN FORCE, 520 (1899).

The case may also be supported on the principles set forth above. The Kingdom of Prussia has remained a distinct entity, and is capable under the Constitution of the German Empire of carrying out its obligations; and even though technically the adoption of that constitution was a breach of the treaty, yet the United States never acted upon it. Furthermore, an extradition treaty is not the kind of treaty a state after such a change in its political status cannot reasonably be expected to carry out, for its execution involves purely ministerial acts, and its object, the mutual helpfulness of returning fugitives from justice, is as desirable after the change as before. Only one other case involving this question has arisen in this country, and in that case the decision was the same. *In re Hermann Thomas*, 12 Blatchf. (U. S. Circ. Ct.) 370. A number of cases have come up in the courts of France and Italy growing out of the union of the Italian states in 1860. Almost without exception the courts have held that the Treaty between France and Sardinia contracted in 1760 remains binding. *Inconomidis c. Coude*, 6 CLUNET 69; *Paris*, PALAIS [1867] 275; *Turin*, GIURISPRUDENZA [1865] 240; *Turin*, LEGGE [1876] 853. A few publicists have discussed the question, but they are not unanimous. See R. LE BOURDELLÈS, De l'application du traité du 24 Mars 1760 entre la France et la Sardaigne, 9 CLUNET 389, 390 *accord*; PASQUALE FIORE, De l'exécution des actes et des jugements étrangers en Italie, 5 CLUNET 235, 244 *contra*.

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LEGISLATIVE CONTROL OVER MUNICIPAL CORPORATIONS. — The question of the extent of legislative control over municipal corporations has occasioned a square conflict of opinion among the courts of this country. One line of cases by decisions or *dicta* has laid down the broad proposition that municipal corporations are the creatures of the legislature, and except for constitutional limitations, expressed or clearly implied, entirely subject to its control. *Commonwealth v. Moir*, 199 Pa. St. 534. On the other hand, in many states the doctrine has been established that municipal corporations cannot be deprived of the right to local self-government; and this view is rested upon either one of two grounds: implied constitutional guarantee, or implied reservation to that effect. *People v. Hurlbut*, 24 Mich. 44; see *The Right to Local Self-Government*, 13 & 14 HARV. L. REV. The result reached in this second class of cases commends itself as being in accordance with the spirit of our institutions and prevailing views of political expediency, but it is doubtful whether it can be supported upon principle. The constitutionality of an act must be determined by reference to the constitution itself, and while undoubtedly certain restrictions upon the power of the legislature may be implied from the language of that instrument, it is only where the implication is strong and clear that the courts are justified in asserting its existence. See 15 HARV. L. REV. 531.

Even those courts that have championed the right of the municipality to self-government have confined that right to matters of purely local

concern. The principle upon which this distinction is based is that the municipality acts in a dual capacity, as the agent of the state with regard to certain matters and as the agent of its own inhabitants with regard to others, and in respect to the former it is subject to the complete control of the state. *People v. Common Council of Detroit*, 28 Mich. 228. While extremely difficult of application, the distinction is indispensable if the doctrine of local independence is accepted. The difficulty lies in drawing the line between matters of general and matters of local concern. In two recent cases it is held that the management of the municipal waterworks and fire department is a matter of purely municipal concern, and that a statute transferring their control to a state board is an unconstitutional interference with the right of municipal self-government. *State v. Barker*, 89 N. W. Rep. 204 (Ia.); *State v. Fox*, 63 N. E. Rep. 19 (Ind., Sup. Ct.). Although the weight of authority sustains these conclusions there are decisions *contra*. *David v. Portland Water Committee*, 14 Or. 98.

A conflict of opinion must necessarily arise upon this question because of the nature of the problem to be solved. The courts are called upon to decide whether the empowering of a municipality to carry on a certain work is a delegation by the state of a matter of general concern, or merely the grant of power to do things in the doing of which the state as a whole has no particular interest. Inasmuch as whatever involves the health and prosperity of a large body of citizens is a matter of interest to the entire state, the administration of matters local in their nature is likely to become of state concern. Where this is true it can fairly be said that the municipality is acting as the agent of the state with respect to those matters and is subject to its control. Under this view the analogy of the decisions upon what constitutes a public use justifying the exercise of the power of eminent domain should be followed, and a wide legislative discretion should be recognized even by those courts that uphold the local independence of the municipality.

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DUE PROCESS IN EX PARTE APPOINTMENTS OF RECEIVERS. — Independently of statute, courts of equity in ordinary cases will entertain an application for the appointment of a receiver only after notice or rule to show cause. *Verplank v. Mercantile Co.*, 2 Paige (N. Y.) 438. In cases of emergency, however, and where under the circumstances the giving of actual notice is impracticable or inexpedient, a receiver will be appointed without such notice having been given. *Hendrix v. American Freehold, etc., Co.*, 95 Ala. 313. The constitutional aspect of such appointments is suggested by a recent decision of the Federal Circuit Court of Appeals for the district of Kentucky. A valid judgment *in personam* had been rendered by a state court against a foreign corporation; the defendant thereupon withdrew all of its tangible property from the state, discontinued its local agencies, and notified policy holders and all others to conduct business with the home office. After return of execution unsatisfied, the state court, upon petition setting forth the facts, appointed a receiver to collect accounts due the judgment debtor from persons within the state and from them to satisfy the judgment. This appointment was attacked by the foreign corporation in a federal court upon the ground that since no notice of the application for the

appointment of a receiver had been given, the proceedings were without due process of law. The court held that the appointment of the receiver was but a continuation of the original action, and that hence no new notice was necessary. But even assuming that it was a new action, the court stated that it was not prepared to say that the constitutional requirement of due process was infringed by the appointment of a receiver before notice. *Phelps v. Mutual Reserve, etc., Assoc.*, 112 Fed. Rep. 453.

The suggestion of the court is entirely sound, although an early Connecticut *dictum* appears to be *contra*. *Bostwick v. Isbell*, 41 Conn. 305. The appointment of a receiver is a purely administrative act for the purpose of enforcing the judgment of the court, and is based upon and confined to the jurisdiction that every sovereign has over property within its territorial limits. The appointment alone is not a deprivation of property, because it is well settled that the receiver himself takes no title but as an officer of the court holds property in the custody of the law. *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 401. There is often, to be sure, a certain temporary interference with the beneficial user of property, but temporary restrictions upon the use of property imposed by a court of equity in the exercise of its extraordinary preventive jurisdiction, even though based upon *ex parte* proceedings, have never been considered obnoxious to the Fourteenth Amendment. After judgment rendered, the disposal of the property by the receiver may amount to a deprivation of property, but is no more repugnant to the constitutional requirement of due process than a levy and sale by a sheriff upon execution duly issued. The receiver's sale, like that of the sheriff, passes only the title of the judgment debtor unless the judgment upon which it was based was given in proceedings *in rem*. The property interests of persons not parties to the judgment upon which the receivership proceedings are based remain unaffected by the receiver's disposal of the property. *Dann Mfg. Co. v. Parkhurst*, 125 Ind. 317. As the mere appointment of a receiver does not effect a change upon the title to the property, and as his disposal affects only the title of those against whom a valid judgment has been obtained, it follows that the requirement of due process does not preclude the appointment of receivers upon *ex parte* proceedings.

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MARTIAL LAW. — About thirty-five years ago the subject of martial law was carefully considered in England as a result of Governor Eyre's acts in suppressing the Jamaica Rebellion. It was likewise considered in the United States at the same time, owing to the conduct of military commanders during the Civil War. The position taken by Lord Chief Justice Cockburn in his charge to the Grand Jury in the case of *Regina v. Nelson and Brand*, and that taken by the majority of the Supreme Court of the United States in *Ex parte Milligan*, 4 Wall. 2, were substantially the same. The rule laid down was, broadly, that no civilian could be tried by martial law, where the civil courts were sitting and in actual exercise of their ordinary functions. Considerable authority was cited to sustain this view. Since then, until very recently, the courts of the two countries have not had occasion to discuss the subject. The war in South Africa, however, brought the question once more before the courts of England. The Judicial Committee of the Privy Council in dismissing a petition for special leave to appeal from the order of the



Supreme Court of Cape Colony, which had denied the petitioner's right to summary release from military custody, held that the absence of visible disorder, and the continued sitting of the courts, did not preclude the existence of martial law. *In re D. F. Marais*, [1902] A. C. 109.

Unfortunately the term martial law is used in several senses. It is applied commonly to what may otherwise be termed military law — the law governing the naval and military forces ; it is applied to the jurisdiction exercised by military commanders over invaded or conquered territory under military occupation ; and it is further applied to the jurisdiction exercised by the executive over all persons during a state of war, in domestic territory. The first two applications of the term may be dismissed from consideration ; for the one is settled everywhere by statute, and the other by the rules of international law. The scope of martial jurisdiction in the last sense cannot be positively defined in the present state of the authorities. This last adjudication on the subject shows the change judicial opinion has undergone in England. It seems undisputed, however, that in time of war, or when a military commander believes *bona fide* and reasonably that there is imminent danger, private property may be seized for the benefit of the state ; and the fact of war or the imminence thereof will be in itself a justification of what would otherwise be a trespass. Y. B. 21 Hen. VII. 27, pl. 5 ; *British Cast Plate Manufacturers v. Meredith*, 4 T. R. 794, 797 ; *Mitchell v. Harmony*, 13 How. (U. S. Sup. Ct.) 115.

On principle it would seem that the same rule should apply to infringement of the rights of personal liberty. See *Ex parte Milligan*, *supra*. Though the courts recognize the identity in principle they differ in opinion as to what is war, when rights of personal liberty are involved. The Supreme Court of the United States has said that the continued sitting of the ordinary courts, and the absence of visible disorder, absolutely preclude a lawful exercise of martial law. The Judicial Committee of the Privy Council takes an opposite view. It is submitted that the latter view is preferable. Under modern conditions it cannot truly be said that the absence of visible disorder shows there is no necessity for martial law. The continued sitting of courts is too artificial a test to be serviceable. Martial law is the law of necessity. The executive must be left unhampered in time of war to deal with problems summarily and to take protective measures without waiting for the machinery of the courts. This view was advanced by Chief Justice Finch as long ago as the famous *Case of Ship-Money*, 3 S. T. 826, 1234. It may be urged that this view gives too great power to the executive, and that it is likely to be abused. The reply would be that it is equally improbable that the ordinary executive would disregard the powerful restraints of public opinion. To carry on a war effectively, the executive must have power ; and reliance must be placed on the ability of the people to restrain him in the use of it. Under the Constitution of the United States, there is no method by which the guaranties of the Bill of Rights can be suspended. The legal justification of martial law must rest on the theory that the doctrine *salus populi lex suprema* is understood as an implied modification of the Bill of Rights. Under Continental constitutions, it should be noted, provision is made whereby the executive on authorization of the legislature may suspend the constitutional guaranties, proclaim a state of siege, and submit all persons to military jurisdiction. See THE CONSTITUTION OF SPAIN (1876). Arts. 4 ; 5 ; 6 ; 9 ; 13, §§ 1, 2, 8 ; 17.

ARBITRARY OFFICIAL DISCRETION. — Legislation which makes the right to pursue ordinary employments depend on the permission of administrative officers is usually held unconstitutional where it lays down no rules for the guidance of such officers and indicates no limits to their discretion. It is said that such legislation gives a power which may be used arbitrarily, and that this is depriving persons of the equal protection of the laws or of liberty or property without due process of law. *Yick Wo v. Hopkins*, 118 U. S. 356. If we grant the construction the conclusion seems unimpeachable. One unimportant decision may be *contra* on the facts, but no constitutional question appears to have been raised. *Roderick v. Whitson*, 51 Hun 620. It is possible that the retail liquor business, and perhaps others of a similar nature, form an exception to the general rule. *Crowley v. Christensen*, 137 U. S. 86. Cf. *Ex Parte Sing Lee*, 96 Cal. 354. In analogous cases that business has been held susceptible of different treatment from ordinary harmless occupations. *Schwuchow v. Chicago*, 68 Ill. 444. On the question of construction, however, there is authority for holding that no arbitrary discretion is intended, but only a reasonable discretion, the arbitrary exercise of which would be controlled by the courts in the ordinary way. *State v. Yopp*, 97 N. C. 477. This rule deserves to be applied oftener than it has been, although, of course, general rules have comparatively little force in matters of construction. There are intimations in some cases that the view in question is not permissible. See *City of Richmond v. Dudley*, 129 Ind. 112; *State v. Tenant*, 110 N. C. 609; *Baltimore v. Radecke*, 49 Md. 217; *Matter of Frazee*, 63 Mich. 396. But it is believed that these *dicta* cannot be supported. *Leader v. Moxom*, 2 W. Bl. 924. Unless, however, the ends to be aimed at in the exercise of discretion are pretty clearly determined by implication or expression and the choice of means is not very broad, the statute or ordinance may fall under the ban of another class of decisions in which the objection is; not that an arbitrary power is intended, but that the officer is expected to make rules to govern the activities of private persons, and that this is an unauthorized delegation of legislative power. *Matter of Frazee*, *supra*; *Chicago v. Trotter*, 136 Ill. 430. This seems to be valid, although the law on the subject is confused, and the applicability of the objection to acts of the legislature is doubtful. See 12 HARV. L. REV. 138.

A recent California case has slightly extended the rule of *Yick Wo v. Hopkins*, *supra*. A statute provided that where, in the work carried on in any factory, noxious gases were generated and were likely to be inhaled by the employees, and it should appear to a certain officer that this might be prevented by using some contrivance, he should order the same to be used, and a violation of his orders should constitute a misdemeanor. *Schaezlein v. Cabaniss*, 67 Pac. Rep. 755. Here it was not the right to carry on the business that depended on the consent of the officer, but merely the right to carry it on in a certain way. The court held that this made no difference, and that the statute was void. This seems to be correct, provided the interference of the officer might make the process of manufacture substantially more expensive or difficult. On the question of construction it is impossible to be dogmatic, and any short criticism would be unsatisfactory. It may be suggested, however, that the officer was apparently intended to extend his supervision to all factories of the class, that he would have little more than a question of fact to decide in each case, that, on a fair construction, he would not be

authorized to order anything which would make the business unremunerative, and that it would be difficult to secure the desired result by general legislation. The question has been discussed above as if it referred merely to the pursuit of ordinary trades or professions, but apparently ordinary methods of public demonstration and perhaps even ordinary recreations are similarly protected. See *Matter of Frazee, supra*; *Chicago v. Trotter, supra*; *State v. Yopp, supra*.

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**RIGHT OF TENANT TO REMOVE FIXTURES AFTER A NEW LEASE.** — It is refreshing to find a restriction placed on the harsh doctrine that a tenant by accepting a lease for a new term without making an express reservation loses his right of removing fixtures. Ever since this doctrine was established by the case of *Loughran v. Ross*, 45 N. Y. 792, the New York courts have been trying to draw back from the unfortunate position then adopted. The principle of that case has received a decided limitation in a recent decision of the appellate division of the Supreme Court. *Bernheimer v. Adams*, 70 N. Y. App. Div. 114. The plaintiff foreclosed his mortgage on the lease and certain fixtures consisting of water-closets, partitions, etc., owned by a tenant. The latter's wife bought the property at the sale, took from the landlord a new lease for the unexpired term similar to the former one except that it ran to her as lessee, and remortgaged the fixtures and her new lease to the plaintiff in lieu of paying him the purchase price. This second mortgage was foreclosed and bought in by the plaintiff who subsequently replevied the fixtures. The court held that the right to remove the fixtures was not lost by the failure of plaintiff's mortgagor to reserve it upon surrendering the old lease.

The court evidently feeling the need of "cumulative" reasons for a decision so much at variance with the early New York doctrine, lays stress on the facts that the lessee was not the original tenant; that the lease was not for an additional term; and that the fixtures were not "distinctively realty." It is submitted that none of these considerations should affect the decision. That the lessee is a new tenant makes if anything a stronger case for the landlord, as it is conceivable that an assignee, taking a new lease in his own name, might not care to preserve the fixtures as such. Furthermore, it is less harsh to deny the right of removal to an assignee than to the original tenant. Nor does the fact that this was a change of tenancy for an unexpired term seem of great weight; for, after all, it was a new holding under a new lease without any reservation, the very crux of the question. It seems that one rule may be applied equally well to the case of a new tenant for the same term, and that of the same tenant for a new term, as both situations result from the surrender of an original tenancy. It might be argued that as the original tenant's right to remove fixtures continues at least until the end of the term, so his successor's also should exist up to that time. To this the reply is that it is a personal right, passing only by assignment, and has not in fact been assigned. The basis of the court's third distinction, that the fixtures in this case were not distinctively realty, is one somewhat favored in New York but of no standing elsewhere. *Smusch v. Kohn*, 22 N. Y. Misc. 344. One can hardly see how this distinction affects the point in issue. It probably is of value in determining whether a given chattel becomes a fixture or not; but granting it a fixture, the

consideration of its essential nature should have no bearing upon whether or not the right of removal survives.

The true foundation of this decision must be sought in the underlying justice of the case and not in the reasoning of the court. Of course the plaintiff's mortgagor never intended to give the fixtures to her landlord, and it would seldom occur to a lay mind that the taking of a new lease could have such a result. The obvious hardship of a rule which makes the lessee take out the fixtures and replace them at the beginning of each new term should be a sufficient reason for the decision in the principal case. Two jurisdictions at least have adopted this more lenient view, *Kerr v. Kingsbury*, 39 Mich. 150; *Second Nat. Bank v. Merrill*, 34 N. W. Rep. 514 (Wis.); although the weight of authority, it must be admitted, is strongly opposed. See *Watriss v. First Bank of Cambridge*, 124 Mass. 571. On grounds of obvious justice to the lessee it is to be hoped that the principal case will have some effect toward changing the present harsh rules on this subject.

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**EFFECT OF STATUTES FOR SURVIVAL OF ACTIONS ON LIABILITY FOR DEATH BY WRONGFUL ACT.**—Statutes providing that personal actions shall survive the death of the party injured are frequently found side by side with statutes which allow action for wrongfully causing death. The latter class of laws—or “death acts”—are generally modelled upon Lord Campbell's Act, 9 & 10 Vict., c. 93, which provides for suit by the personal representative of the deceased for the benefit of his near relatives. Such provisions seem applicable to many cases also covered by the survival acts, and the decisions are squarely in conflict on the question of allowing recovery under both statutes for the same wrongful act. The solution of this question seems ultimately to depend on whether the death acts create an essentially new cause of action or merely apply to cases outside the scope of the survival acts and add death as a new element of damage. The cases which adopt the latter view hold that the legislature never intended to allow two actions, and evade in various ways the apparent concurrence of the remedies. Such an evasion is made in Michigan, where it has recently been held that the death acts apply only to cases where, owing to instantaneous death, no right of action ever vested in the deceased, and where, consequently, there could be no question of survival. *Dolson v. Lake Shore, etc., Ry. Co.*, 87 N. W. Rep. 629; *Jones v. McMillan*, 88 N. W. Rep. 206. To place such a restriction on the death acts, however, seems inconsistent with their broad wording and is certainly contrary to the great weight of authority. See *Com. v. Met. R. R. Co.*, 107 Mass. 236; TIFFANY, DEATH BY WRONGFUL ACT, § 73. Other courts make the evasion by restricting the survival acts, and hold that they apply only where the death was due to causes other than the tort sued for. *Martin v. M. P. Ry. Co.*, 58 Kan. 475; *Holton v. Daly*, 106 Ill. 131. This interpretation seems equally unwarranted by any provision of the statutes and is not generally followed. *Davis v. Ry.*, 53 Ark. 117; *Brown v. C. & N. W. Ry. Co.*, 77 N. W. Rep. 748 (Wis.).

On the other hand, the view that the death acts give a new right, thus allowing a double remedy, is supported by the weight of authority and seems preferable. *Bowes v. City of Boston*, 155 Mass. 344; *Needham*

**v. Grand Trunk Ry. Co.**, 38 Vt. 294. The courts which adopt it reason that, while the defendant's liability is created by only a single act on his part, yet that act is in violation of two rights, — the common law right of the deceased to personal immunity and the statutory right of his relatives to his life. The wrong in one action is the personal injury, and the statute of limitations runs from the time of such injury. The damages are for the physical suffering and the financial loss of the deceased up to and ending with the time of death. *Muldowney v. Ill. Cent. Ry. Co.*, 36 Ia. 462. The sum recovered becomes part of the general estate and is subject to the claims of creditors. In suits for the death, however, the wrong is causing the death, and the period of limitation, which is expressly provided by the majority of such statutes, runs from the time of death. The damages are restricted to the pecuniary loss to relatives resulting from the death, which are, of course, subsequent to it in time. *Needham v. Grand Trunk Ry. Co.*, *supra*; *Kelley v. Cent. R. R. of Ia.*, 48 Fed. Rep. 663. Though the personal representative of the deceased may be the plaintiff in both suits, still that he is regarded as acting in different capacities is shown by a decision that facts established in one action are not *res adjudicata* for the purposes of the other. *Leggott v. Great Northern Ry.*, L. R. 1 Q. B. D. 599. The recovery in the action for death is solely for the benefit of relatives, and creditors of the deceased have no rights in the sum recovered. *Cf. Gores v. Graff*, 77 Wis. 174. If the double remedy is allowed, therefore, both the creditors and the relatives are compensated, whereas the contrary view must regard one or the other as having sustained *damnum absque injuria*, — a result certainly not in keeping with the purpose of this legislation. See 9 & 10 VICT., c. 93.

It is true that since the view advocated involves the doctrine that recovery by the administrator for the personal injury is no bar to an action for the death itself, it is not entirely consistent to hold that if the deceased had before his death recovered for this same personal injury, no subsequent proceedings for the death could be maintained. The latter position, however, is necessary, inasmuch as the usual death act requires that the deceased in such a case be "entitled to maintain an action," at the time of death. *Read v. Grt. East. Ry.*, L. R. 3 Q. B. 555. But this inconsistency does not seem to be an objection of decisive weight, as it is due merely to an inadequate wording of the statute. See 28 AM. LAW REG., N. S., 385, 513, 577.

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## RECENT CASES.

**BANKRUPTCY — ACTS OF BANKRUPTCY — PRESUMPTION OF INTENT TO PREFER.** — The defendant was alleged to have committed an act of bankruptcy, under § 3, a, (2), of the Bankruptcy Act, by having transferred, while insolvent, a portion of his property to certain creditors "with intent to prefer such creditors." *Held*, that, the fact of insolvency at the time of the transfer being doubtful, the intent to prefer will not be presumed. *In re Gilbert*, 112 Fed. Rep. 951 (Dist. Ct., Or.).

The United States courts have always held that where a debtor, knowing his insolvency, transfers property to certain of his creditors, an intent to prefer them will be conclusively presumed. And they have laid down a further rebuttable presumption, where the fact of insolvency is clear, that the debtor had knowledge of his financial condition. *Toof v. Martin*, 13 Wall. (U. S. Sup. Ct.) 40; *cf. Mundo v.*



*Shepard*, 166 Mass. 323, *contra*. These presumptions are applied in cases arising under § 3, *a*, (2), of the present act. *In re McGee*, 105 Fed. Rep. 895. But where, as in the principal case, the fact of insolvency is doubtful, a distinction may well be drawn. For naturally the presumption that a fact is known to one when its existence is peculiarly within his sphere of knowledge, will fail when the truth of that fact is itself uncertain. Accordingly the decision, which seems to be the first on the point, in holding that the intent to prefer must in this case be proved without the aid of a presumption, seems eminently proper.

**BANKRUPTCY — JURISDICTION OF FEDERAL COURTS.** — Shortly before the filing of the petition in bankruptcy the defendant had received certain money as agent of the bankrupt, and this he refused to deliver to the trustee. The trustee filed a petition before the referee to obtain payment but the defendant, while admitting that the money belonged to the bankrupt, denied the jurisdiction. *Held*, that the court has jurisdiction to issue the order sought. *Mueller v. Nugent*, 22 Sup. Ct. Rep. 269.

Under § 2, (7), of the Bankruptcy Act, the federal courts have power to cause estates of bankrupts to be collected and to determine controversies in relation thereto, except as otherwise provided. It is now settled that this power is subject to the provisions of § 23 allowing the trustee, except with consent of the defendant, to bring suit only in courts in which the bankrupt could have sued. *Bardes v. Hawarden Bank*, 178 U. S. 524. If therefore the proceedings in the principal case constitute a "suit" by the trustee, the court was without jurisdiction. This result however would be extremely undesirable, since it would hamper bankruptcy proceedings enormously. No question of right or title remained to be determined, for the defendant admittedly held the money as agent of the bankrupt. It seems therefore a fair construction that the court was not entertaining a "suit" by the trustee, but merely issued an administrative order for the collection of the estate.

**BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — LIFE INSURANCE POLICY.** — By a semi-tontine policy an insurance company contracted to pay to beneficiaries therein named a certain amount on the death of X, the bankrupt. But if X should be alive at the end of the tontine period, the company promised to pay to X himself a certain amount instead, giving him also other options. § 70, *a*, (5), of the Bankruptcy Act provides that the trusteeshall be vested with the title of the bankrupt to all "property which . . . he could by any means have transferred . . ." *Held*, that the policy has an actual value to the bankrupt, which passes to the trustee. *In re Welling*, 113 Fed. Rep. 189 (C. C. A., Seventh Circ.).

There are cases which hold that an ordinary life-insurance policy, payable to the legal representatives of the insured and having no surrender value, does not pass to the trustee. *Morris v. Dodd*, 110 Ga. 606. If the ground for this holding is that the insured has no interest in the policy, the decisions have no bearing on the present question; for a policy by which, as in the principal case, a specified amount is payable to the insured if he survives a stated period, constitutes a contract in which the insured has a valuable interest. If the ground is that life-insurance policies are not assignable, the cases seem to be erroneous. By the weight of authority an ordinary life-insurance policy is assignable, unless the assignment is in fact a gaming transaction. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24; but *cf. Warnock v. Davis*, 104 U. S. 775. Subject to the same qualification, the interest of the insured should be transferable by him under the circumstances of the principal case, and the cases so hold. *Brigham v. Home Life Ins. Co.*, 131 Mass. 319. That interest would seem therefore to be property which passes to the trustee under § 70, *a*, (5).

**CONFLICT OF LAWS — DISPOSITION OF THE PERSONALTY OF AN INTESTATE WITHOUT HEIRS OR NEXT OF KIN.** — A domiciled Austrian was the beneficiary of a fund in England. He died unmarried and without heirs. The fund, which was paid into court, was claimed by the Austro-Hungarian and by the English Treasury officials. *Held*, that the fund must be paid into the English Treasury. *In re Barnett's Trusts*, 18 T. L. R. 454 (Eng., Ch. D.).

The distribution of the personalty of an intestate is generally made in accordance with the law of his domicile. *Enohin v. Wylie*, 10 H. L. Cas. 1. Since Austrian law gives to the state the property of an unmarried intestate without heirs, it was contended that the Austrian treasury was entitled. This contention would be well founded, if the state could be regarded as claiming by succession. It is submitted, however, that a claim to personalty in such cases is not a claim through the *persona*

of the intestate but a claim to take as *bona vacantia*, because there is no succession. See *Middleton v. Spicer*, 1 Bro. C. C. 201; *Taylor v. Haygarth*, 14 Sim. 8. The maxim *mobilia sequuntur personam* is applied only on grounds of comity and convenience, and neither demands that it should be extended to cover a case like this. No decisions have been found on the point; viewing it as a speculative question, leading continental jurists are divided in opinion. See GILLESPIE'S BAR, PRI. INTERNAT. LAW, § 114, *accord*; GUTHRIE'S SAVIGNY, PRI. INTERNAT. LAW, 234-235, *contra*.

CONSTITUTIONAL LAW — MARTIAL LAW JURISDICTION OVER CIVILIANS. — Martial law was proclaimed in Cape Colony, and the petitioner was arrested and kept in custody by the military authorities. Neither the district in which he was taken nor the district in which he was held was the scene of active operations, and the ordinary courts were in session. The petitioner asked the Supreme Court of the colony to release him from military custody, and on the refusal of his application prayed the Judicial Committee of the Privy Council for special leave to appeal. *Held*, that the petition must be denied. *In re D. F. Marais*, [1902] A. C. 109 (Eng., P. C.). See NOTES, p. 850.

CONSTITUTIONAL LAW — RECEIVERS — JURISDICTION OF COURT. — A state court rendered a valid judgment *in personam* against a non-resident insurance company. The company subsequently withdrew its property from the state and discontinued its local agencies, notifying policy holders to transact business with the home office. The judgment execution having been returned *nulla bona*, the state court, on petition of the plaintiff, appointed a receiver to collect premiums and accounts due the judgment debtor from persons within the state. The insurance company brought a bill in a federal court to enjoin the receiver from so acting. *Held*, that the fact that no notice of the application for the appointment of a receiver had been given to the company did not invalidate such appointment under the Fourteenth Amendment. *Phelps v. Mutual Reserve, etc., Assoc.*, 112 Fed. Rep. 453. See NOTES, p. 849.

CONSTITUTIONAL LAW — STATUTE GIVING ARBITRARY POWER TO OFFICIAL. — A statute provided that whenever in the work carried on in any factory noxious gases were generated and were likely to be inhaled by employees, if it should appear to a certain official that this might be prevented by any contrivance, he should order the same to be used, and a violation of such order should constitute a misdemeanor. *Held*, that the statute is unconstitutional. *Schaezlein v. Cabaniss*, 67 Pac. Rep. 755 (Cal.). See NOTES, p. 852.

CORPORATIONS — JUDGMENT AGAINST CORPORATION — CONCLUSIVENESS AGAINST STOCKHOLDERS. — The complainant, having obtained a judgment against a corporation, filed a bill praying for an assessment against the stockholders on unpaid stock subscriptions. *Held*, that the defendants may set up in defence the failure of consideration for the notes on which the judgment was obtained. *McBryan v. Universal Elevator Co.*, 89 N. W. Rep. 683 (Mich.).

The rule that a judgment against a corporation is conclusive against the stockholders, unless obtained through fraud or collusion, or from a court without jurisdiction, has been generally applied to suits by judgment creditors to compel payment of unpaid subscriptions. *Ball v. Reese*, 58 Kan. 614; *Nichols v. Stevens*, 123 Mo. 96. The theory is that the stockholder is in privity with the corporation, and represented by it; and that, since unpaid subscriptions are debts due the corporation, the creditor should be allowed to collect them under his judgment without the necessity of proving his claim again. Some authorities, however, in cases of special hardship, have allowed the stockholders to go behind the record and to show defences which would have been good against the original action. *Saylor v. Commonwealth I. & B. Co.*, 38 Or. 204; *Ward v. Joslin*, 105 Fed. Rep. 224; *cf. Miller v. White*, 50 N. Y. 137. The wisdom of this policy is doubtful; and it seems certain that the right should not be extended to cases where the only special hardship is, as in the principal case, the corporation's failure to set up a clear defence. The contract liability for unpaid subscriptions is to be distinguished from special statutory liabilities, which create assets of a peculiar character. See *Stephens v. Fox*, 83 N. Y. 313.

CORPORATIONS — UNPAID STOCK — RIGHTS OF CREDITOR AGAINST TRANSFeree. — *Held*, that a transferee of stock purporting to be fully paid, who has notice that it is

not in fact fully paid, is primarily liable to creditors of the corporation for the amount remaining unpaid. *Foot v. Illinois, etc., Bank*, 62 N. E. Rep. 834 (Ill.). See NOTES, p. 844.

**CRIMINAL LAW — HOMICIDE — SELF-DEFENCE.** — In a trial for homicide, the court instructed the jury that if the defendant sought a meeting with the decedent with the intention of provoking a quarrel with him and taking his life, the defendant could not justify the killing upon the ground of self-defence. *Held*, that the court erred in denying to the defendant his right of self-defence if he had done no act and used no language of a character to provoke a quarrel. *Johnson v. State*, 66 S. W. Rep. 845 (Tex., Cr. App.).

All authorities agree that a defendant in a prosecution for homicide cannot find shelter behind a plea of self-defence, when he has voluntarily created the very necessity which he sets up in justification of his act. See HAWKINS, P. C., c. 10, § 22. This rule applies where the defendant himself began the affray by assaulting the decedent. *Middleton v. Commonwealth*, 6 Ky. 51. And a defendant who has voluntarily provoked the affray by the use of insulting language, stands in no better position. *State v. Scott*, 41 Minn. 365. It is probable that where a defendant knew that any meeting with the decedent would be likely to result in a murderous attack upon himself, and sought a meeting with the intention thereby to provoke such attack, the same rule would apply. But where he sought the meeting intending by further acts and words to provoke an assault and was attacked without such provocation, he has not created the necessity that he pleads in justification of the killing, and should not be denied the plea of self-defence merely because of his unexecuted intention. 1 HALE, P. C. 479. There are decisions to the contrary in some jurisdictions. *State v. Neely*, 20 Ia. 108; *Vaiden v. Commonwealth*, 12 Gratt. (Va.) 717.

**EQUITY — NECESSARY PARTIES — ORIGINAL JURISDICTION OF SUPREME COURT — NORTHERN SECURITIES CASE.** — The state of Minnesota moved for leave to file an original bill in the United States Supreme Court against the Northern Securities Company, a New Jersey corporation, to restrain the latter from controlling two Minnesota corporations. It was alleged, *inter alia*, that all the stockholders in the Northern Securities Company were stockholders in the other corporations and that they held a majority of the stock of each. *Held*, that the two Minnesota corporations are necessary parties defendant, and as the joinder of such parties would defeat the court's jurisdiction, the motion must be denied. *State of Minnesota v. Northern Securities Co.*, 22 Sup. Ct. Rep. 308.

Where certain persons are so connected with the transaction which forms the subject of a controversy in equity that a final decree without their presence would necessarily affect their interests, they must be joined as parties, unless adequately represented by a party before the court. *Shields v. Barrow*, 17 How. (U. S. Sup. Ct.) 130, 140; *Mallow v. Hinde*, 12 Wheat. (U. S. Sup. Ct.) 193. Whether the Minnesota corporations were such indispensable parties is mainly a question of fact, and though it appears unlikely that their joinder would affect the result, the decision of the court, which seems technically correct, is the less to be criticised in view of the large discretion of a court of equity as to such matters. The point as to jurisdiction is fairly plain. The first clause of Art. 3, § 2, of the Constitution, declaring to what cases the judicial power of the United States shall extend, does not include suits by a state against its own citizens; and the second clause, giving the Supreme Court original jurisdiction in cases to which a state shall be a party, is rightly construed as applying only to those cases enumerated in the first clause in which a state may be a party. *Pennsylvania v. Quicksilver Co.*, 10 Wall. (U. S. Sup. Ct.) 553. It is further established that if any of the necessary parties defendant are citizens of the state which is the party plaintiff, the jurisdiction is defeated. *California v. Southern Pacific Co.*, 157 U. S. 229.

**ESTOPPEL — WAIVER OF EXISTING RIGHT — CONTRACT BY ESTOPPEL.** — The husband of an intestate brought suit to set aside, for want of consideration, a contract between himself and the next of kin by which both parties agreed to make such releases as should be necessary to carry out the terms of an invalid will. The administrator had made a partial distribution in accordance with this agreement. *Held*, that the plaintiff is estopped to deny the contract. *Williams v. Whittell*, 69 N. Y. App. Div. 340.

In general an estoppel can arise only from a misrepresentation of a present fact;



but some courts have given the same effect to a promise which amounts to a waiver of an existing right. *Faxton v. Faxon*, 28 Mich. 159. See *Ins. Co. v. Mowry*, 96 U. S. 544, 548. In ordinary estoppel, if the representation applies to several matters or things, and the party acting upon it has been influenced only by its application to certain of them, it can be withdrawn as to the others. *White v. Greenish*, 11 C. B. N. s. 209. On the same principle, in cases like that under discussion, the plaintiff should ordinarily be bound only to the extent of contributing his share to sums already paid out under the contract, which would not have been payable under intestacy. *Haviland v. Willets*, 141 N. Y. 35. But if, in the principal case, there were payments of this sort which would not have been agreed to by the other parties, but for their expectation that the whole arrangement would be carried out, then the plaintiff should be bound as to the entire estate. The decision might also be rested on the ground that the mutual releases were sufficient consideration for each other. Cf. *Bunn v. Bartlett*, 28 N. Y. St. Rep. 239.

**EVIDENCE — HEARSAY — REPORT OF TESTIMONY GIVEN THROUGH AN INTERPRETER.** — The defendant was on trial for perjury, the indictment alleging the falsity of testimony given by him through an interpreter at a former trial between other parties. A witness who had not understood the defendant was allowed to give in evidence the defendant's statements as repeated by the interpreter. *Held*, that this evidence should not have been admitted. *State v. Terline*, 51 Atl. Rep. 204 (R. I.).

A witness who cannot speak the language of the *forum* may always be required to testify through an interpreter appointed by the court. See *Schearer v. Harber*, 36 Ind. 536. Since both the witness and the interpreter are under oath and subject to cross-examination, the hearsay rule is inapplicable. See WHARTON, EV., § 174. The translation becomes the testimony of the witness in the original trial and may be treated as such in subsequent trials between the same parties. See *Schearer v. Harber*, *supra*. But where, as in the principal case, it becomes material to prove what the witness himself said, as distinguished from what testimony was given, a difficulty presents itself. In this situation it is hard to meet the objection of hearsay, unless the statements of the witness are testified to by the interpreter himself or by some other person who understood the witness. See *People v. Ah Yute*, 56 Cal. 119. Though a report of the testimony as given by the interpreter would be logically much more reliable evidence on the question at issue than most hearsay, such considerations do not affect the absoluteness of the hearsay rule. See THAYER, PREL. TREAT. EV., 521, 522.

**INSURANCE — CHANGE IN BUILDING LAWS — AMOUNT OF RECOVERY.** — The plaintiff's building, insured by the defendant company, was partially destroyed by fire. A law passed since the issuance of the policy necessitated a different mode of construction, greatly increasing the cost of repair, but not giving to the building thus repaired any added value. *Held*, that the plaintiff is entitled to recover on the policy the cost of repairing in conformity with the ordinance. *Pennsylvania Co., etc., v. Philadelphia Contributorship, etc.*, 51 Atl. Rep. 351 (Pa.).

Where by reason of an ordinance, though passed after the insuring, a building partially destroyed may not be repaired, recovery may be had as for a total loss. *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Williams v. Hartford Ins. Co.*, 54 Cal. 442. The theory underlying these cases seems properly applicable to the principal case, where the ordinance affects not the right, but the mode of repair. In one case as in the other, the value of the undestroyed portion, considered with reference to such uses as may legally be made of it, is materially lessened. Accordingly the amount that would otherwise fairly represent the loss should be increased to the extent of this diminution. See *Brady v. Northwestern Ins. Co.*, *supra*. The court, though recognizing this principle, does not seem to apply it accurately. The cost of repairs is not the measure of damages. Cf. *Brinley v. National Ins. Co.*, 11 Met. (Mass.) 195. It has its bearing merely as evidence of the value of the portions undestroyed. Thus qualified, the doctrine of the principal case seems sound, though no exactly parallel cases have been found. Cf. *Peters v. Warren Ins. Co.*, 14 Pet. (U. S.) 99.

**INSURANCE — FALSE ENTRIES BY MEDICAL EXAMINER — AGREEMENT THAT EXAMINER BE AGENT OF INSURED.** — The medical examiner of a life insurance company made material omissions in recording the answers of an applicant. There was an agreement in the application that the medical examiner should be the agent of the applicant. *Held*, that the omissions do not defeat the plaintiff's right to recover on the policy. *Sternaman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13.

In the absence of agreement it is generally held that the medical examiner is the agent of the insurer, and that the untruth of the answers as recorded is therefore no defence in an action on the policy, if the applicant was truthful in his oral answers. *Union Ins. Co. v. Wilkinson*, 13 Wall. 222; see 15 HARV. L. REV. 583. Whether the medical examiner acted for the insurer or for the insured is a question of fact. See *Dickinson County v. Mks., etc., Ins. Co.*, 41 Ia. 286. If he acted under the direction and control of the insured he was the latter's agent. But if, as is usually the case, he acted under the general directions of the insurer, the agreement could not make him the agent of the insured. There seems to have been evidence enough in the principal case to justify the finding that the examiner acted in fact as the company's agent, in spite of the agreement. The case is in accord with earlier decisions. *Gau v. St. Paul, etc., Ins. Co.*, 43 Wis. 108; *Whitehead v. Germania Ins. Co.*, 76 N. Y. 415.

INTERNATIONAL LAW—EXTRADITION UNDER TREATY MADE WITH PRUSSIA PRIOR TO THE FORMATION OF THE GERMAN EMPIRE.—A German consul asked for the extradition of a fugitive from Prussia, under the Treaty of 1852 between the United States and the Kingdom of Prussia (10 U. S. Stat. 964). On an application for a writ of *habeas corpus*, the prisoner contended that treaty became void by the incorporation of the Kingdom of Prussia into the German Empire. *Held*, that the treaty is still in force. *Terlinden v. Ames*, 22 Sup. Ct. Rep. 484. See NOTES, p. 847.

JURISDICTION—FEDERAL INJUNCTION BOND—COUNSEL FEES.—After the dissolution of an injunction obtained in a federal court, an action on the injunction bond was brought in a state court, and counsel fees were allowed, in accordance with the state law, as an element of damages. The obligor on the bond disputed this item, and appealed to the United States Supreme Court on the ground that the judgment deprived him of an immunity which he possessed in the pursuit of an "authority exercised under the United States" (Rev. Stat. § 709). *Held*, that the Supreme Court should assume jurisdiction and reverse the verdict as to the counsel fees. *Tullock v. Mulvane*, 22 Sup. Ct. Rep. 372.

In the state courts generally, counsel fees are allowed as damages. *Cook v. Chapman*, 41 N. J. Eq. 152; *Corcoran v. Judson*, 24 N. Y. 106; *Behrens v. Mackenzie*, 23 Ia. 333. The opposite rule, however, prevails in the federal courts. *Oelricks v. Spain*, 15 Wall. (U. S. Sup. Ct.) 211, 231. Since in the principal case the bond was given in a suit in a federal court, the parties should properly be regarded as contemplating that the rules of interpretation applicable to it were those of the federal courts. As a decision on substantive law, therefore, the principal case seems sound. The propriety of allowing the appeal from the state court is not so clear, however. The mere fact that a federal judgment or statute is incidentally involved is insufficient. *Provident, etc., Soc. v. Ford*, 114 U. S. 635; *De Lamar's, etc., Co. v. Nesbitt*, 177 U. S. 523. But in some cases the treatment of a federal judgment by a state court has been reviewed. *Dupasseur v. Rochereau*, 21 Wall. (U. S. Sup. Ct.) 130. And an action on a federal injunction bond, as such, has been carried up. *Meyers v. Block*, 120 U. S. 206. While the statute may not literally include this case, the nature of the subject and the need of uniformity make the result reached in the principal case highly desirable.

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—EXTENT OF LEGISLATIVE CONTROL.—*Held*, that a statute authorizing the appointment by the district court of persons to act as trustees of municipal waterworks, is an unconstitutional interference with the right of the municipality to self-government. *State v. Barker*, 89 N. W. Rep. 204 (Ia.).

*Held*, that a statute authorizing the appointment by the governor of a board to control the municipal fire department, is an unconstitutional interference with the right of the municipality to self-government. *State v. Fox*, 63 N. E. Rep. 19 (Ind., Sup. Ct.). See NOTES, p. 848.

PENSIONS—EXEMPTION FROM ATTACHMENT—PROPERTY BOUGHT WITH PENSION MONEY.—It is provided by U. S. R. S., § 4747, that "no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure . . . but shall inure wholly to the benefit of such pensioner." *Held*, that the act does not apply after the pensioner has received the money, and therefore does not exempt land bought by him therewith. *McIntosh v. Aubrey*, 22 Sup. Ct. Rep. 561.

By this decision, from which three justices dissented, the United States Supreme Court has settled a disputed point in accord with the great weight of authority. *Rouelle v. Rhodes*, 116 Pa. St. 129; *Spelman v. Aldrich*, 126 Mass. 113; *contra*, *Crow v. Brown*, 81 Ia. 344. An argument against the view here adopted has been drawn from the clause "shall inure wholly to the benefit of such pensioner." Furthermore, it is said that the statute, if construed as in the principal case, would add nothing to previously existing law; for, independently of statute, garnishment or equitable attachment would not be available against the United States or its officers, and it would therefore seem impossible to reach the money before its receipt by the pensioner. See *Buchanan v. Alexander*, 4 How. (U. S. Sup. Ct.) 20. But looking at the statute as a whole, it seems fair to regard the final clause as merely summing up the particular provisions which precede it, and not as a further sweeping enactment; and the previous provisions are sufficiently clear and definite to justify the decision.

**PERSONS — SURRENDER OF INSURANCE POLICY BY INFANT — AVOIDANCE BY EXECUTOR.** — An infant took out a life insurance policy, and later surrendered it in consideration of receiving its then cash value. He died before attaining his majority, and his administrator sued on the policy, claiming the right to disaffirm the contract of surrender. *Held*, that the surrender of the policy cannot be avoided. *Pippen v. Mutual, etc., Ins. Co.*, 40 S. E. Rep. 822 (N. C.).

The doctrine that an avoidance during infancy of an executory contract cannot be disaffirmed is supported by the only American case on the point; but it is opposed by several English *dicta*. *Edgerton v. Wolf*, 6 Gray (Mass.) 453; see *North Western Ry. Co. v. M'Michael*, 5 Ex. 114, 127; *Slator v. Trimble*, 14 Ir. C. L. 342. The peculiar Michigan rule that contracts cannot be avoided during infancy necessarily reaches the opposite result. See 15 HARV. L. REV. 585. The theory of *Edgerton v. Wolf*, *supra*, is that the disaffirmance destroys the first contract and puts the parties in the same position as if none had been made. When, as here, instead of an ordinary disaffirmance of the original contract, there is a new contract of compromise or rescission, the principle protecting infants would strictly seem to allow avoidance of this second contract; but it would be obviously unjust to allow infants to break up arrangements repeatedly. Public policy, therefore, could not well allow a different result from that of the principal case. If, through default in the payment of premiums after the surrender, the policy lapsed, all rights thereunder would clearly be lost.

**PROPERTY — CLAIM OF EXECUTOR AGAINST ESTATE — STATUTE OF NON-CLAIM.** — A statute barred actions on claims against the estates of deceased persons after two years from the executor's giving bond. An executor, having a claim against his testator's estate which he had failed to present to the court within this period, retained assets sufficient to satisfy the claim. *Held*, that such retention is allowable. *Brown v. Greene*, 63 N. E. Rep. 2 (Mass.).

In some jurisdictions an executor may waive the defence of the general statute of limitations in favor of creditors against whose claims the statute has run. See 15 HARV. L. REV. 414. From this it is often said that his right to retain assets to satisfy a similar claim of his own follows by analogy. *Baker v. Bush*, 25 Ga. 594. On the other hand an executor is nowhere allowed to waive in favor of other creditors the special statutes concerning the presentation of claims against estates. *Amoskeag Mfg. Co. v. Barnes*, 48 N. H. 25. If then the right of retainer is to be governed by analogy, it ought not to cover claims of the executor not presented within the prescribed period. This view has been adopted by some courts. *In re Taylor's Estate*, 10 Cal. 482; *Byrn v. Fleming*, 3 Head (Tenn.) 658. It would seem, however, that the right of retainer is in reality based upon the executor's holding the legal title to the property from which he seeks satisfaction. See *Spencer v. Spencer*, 4 Md. Ch. 456. Accordingly, statutes limiting the time for bringing actions do not affect his right, because at no time has he ever had a right of action against himself as executor. See *Trimble v. Fariss*, 78 Ala. 260. The principal case thus reaches a sound result; and it is supported by authority. *Sanderson's Adm. v. Sanderson*, 17 Fla. 820; *Stahlschmidt v. Lett*, 1 S. & G. 415.

**PROPERTY — COVENANT OF WARRANTY — TOTAL FAILURE OF TITLE.** — The defendants, husband and wife, had joined in a warranty deed granting to the plaintiff certain lands held in the wife's right. Title had completely failed. The defendantsimpleaded the wife's grantor, who had given a covenant of warranty. *Held*, that the

plaintiffs can recover on the husband's covenant, while the wife, though not liable herself in this action, can recover from her grantor the purchase money which she paid. *Johnson v. Blum*, 66 S. W. Rep. 461 (Tex., Civ. App.).

The decision, so far as it allows the wife to recover, was made reluctantly and was rested on previous Texas authority. The theory of the cases relied on seems to be that when, after any conveyance of realty, title fails completely, there is such failure of consideration as to create a *quasi-contractual* right to recover the purchase price. See *Rayner Cattle Co. v. Bedford*, 91 Tex. 642, 646, 650. Since recovery was not allowed against the wife in the principal case, this right seems to have been illogically limited to cases where there is a binding covenant for title. It would appear just and logical to allow the right whenever the deed purported to convey a good title, independently of the question whether there was a binding covenant of warranty. But the rule is almost universal that, in absence of fraud, the grantee's only relief, either in law or equity, is upon the covenants in his deed. See 8 HARV. L. REV. 119.

**PROPERTY — FIXTURES — EFFECT OF NEW LEASE ON TENANT'S RIGHT OF REMOVAL.** — The purchaser of a leasehold interest and certain fixtures took a new lease from the landlord for the remainder of the term, without reserving the right to remove the fixtures, and then mortgaged his term and the fixtures to the plaintiff. The latter bought them in at the foreclosure sale, and replevied the fixtures from the landlord. *Held*, that the right of removal was not lost by acceptance of the new lease, and passed to the plaintiff by his purchase. *Bernheimer v. Adams*, 70 N. Y. App. Div. 114. See NOTES, p. 853.

**PROPERTY — POWERS — COVENANT BY DONEE OF SPECIAL TESTAMENTARY POWER OF APPOINTMENT.** — The donee of a special testamentary power of appointment covenanted to appoint a certain *minimum* to some of the objects of the power. *Held*, that the covenant is absolutely void, and a failure so to appoint gives no right to damages from the covenantor's estate. *In re Bradshaw*, [1902] 1 Ch. 436.

The fact alone that the power was exercisable only by will hardly accounts for the decision, since a covenant to exercise a similar general power is valid. *In re Parkin*, [1892] 3 Ch. 510. It is established, however, that an appointment under a special power is bad if it involves a benefit for the appointor. *Wellesley v. Mornington*, 2 K. & J. 143. Here, if the covenant is valid, an appointment which would discharge the appointor's obligation would serve his personal interests, and should logically be held bad; and those persons in whose favor the covenant ran would thus be excluded from any possibility of taking. Moreover, the existence of a valid covenant would tend to bias the appointor's choice. The principal decision makes this doubly undesirable situation impossible and fits in with decisions that appointments in accordance with such covenants are good. See *Palmer v. Locke*, 15 Ch. D. 294. It has, however, been pointed out that the principal case is inconsistent with the decisions that a covenant by a donee not to appoint extinguishes a special power. 18 L. QUART. REV. 112. But such decisions themselves seem anomalous, being based on an unnecessary extension of an earlier rule that the power is extinguished if the donee creates an entirely new estate by a valid fine or recovery. See *Smith v. Death*, 5 Madd. 371; and *cf. Horner v. Swann*, Tur. & Rus. 430.

**PROPERTY — REMOTE APPOINTMENT — ELECTION.** — The donee of a special power made by will an appointment which was void for remoteness. He also left in the same will a bequest of certain of his own property to X, who was one of the class to take in default of appointment under the power. *Held*, that X must elect between his interest under the will and his interest in default of appointment, and if he chooses the former the appointment must be carried out. *In re Bradshaw*, [1902] 1 Ch. 436.

It is apparently well settled that where the donee of a special power makes in the same will an appointment to persons not objects of the power, and a devise or bequest from his own property to one who would take in default of appointment, the latter if he takes under the will must carry out its provisions in regard to the property appointed. *Whistler v. Webster*, 2 Ves. Jr. 367. But according to some authorities there is no case for election if the appointment, though to proper objects, is too remote. *In re Warren's Trusts*, 26 Ch. D. 208; *In re Hancock's Trusts*, L. R. 23 Ir. 34; see also *Wollaston v. King*, L. R. 8 Eq. 165. It is said in support of this distinction that to enforce election in such cases is to aid an attempted infraction of the rule against perpetuities. An answer to this reasoning has, however, been pointed out, and the distinction disapproved. GRAY, PERP., §§ 541-561; see *Albert v. Albert*,



68 Md. 352. For those ineffectually appointed take by transfer from the one who elects, not under the power. See SUG., POW., 8 ed., 578, 583. Therefore their estates are not to be measured as regards remoteness from the time of the creation of the power. If it were impossible to carry out the intended appointments because still too remote, election would probably not be enforced.

**PROPERTY—RIPARIAN OWNER—RIGHT TO SPECIFIC WATER WHICH WOULD NATURALLY FLOW.**—A riparian owner intermittently diverted water from a stream, but turned into the stream other water from a different source. *Held*, that the lower court properly refused to instruct that the plaintiff must be restricted to nominal damages if the total flow of the stream was undiminished, since a riparian owner's right is to receive the specific water which would naturally flow by his premises. *Commissioners of Aberdeen v. Bradford*, 51 Atl. Rep. 614 (Md.).

The discussions of courts on riparian rights are usually ambiguous in their bearing on the right to specific water. Where the language is broad enough to imply such a right, it seems generally to have been used loosely, the court not having this point in mind. The only decision found is opposed to the doctrine of the case under discussion. *Elliot v. Fitchburg R. R. Co.*, 10 Cush. (Mass.) 191. Since a riparian owner's right is simply a right to the beneficial use of the stream, it is submitted that he should be allowed an action only when his use is made less beneficial by an unfavorable variation in the quantity or quality of the water, or in the regularity of its flow. The recognition of the right to specific water would not confine recovery within these limits. The actual decision of the principal case, however, is supportable on the ground that the instructions requested did not take into consideration a possible interference with the regularity of the flow of the stream. *Cf. Ware v. Allen*, 140 Mass. 513.

**QUASI-CONTRACTS—PAYMENT TO AGENT—LIABILITY OF UNDISCLOSED PRINCIPAL.**—The defendant sold land at auction through his agent. The plaintiff contracted to purchase, believing the agent to be the real vendor. Payment was to be made within ten days. After the expiration of this time, the agent accepted a part payment on the contract, the plaintiff still believing him to be the principal. The agent then absconded with the money. The plaintiff having failed to complete the purchase, the defendant resold, and the plaintiff sued for money paid. *Held*, that as the agent had no authority to extend the time, the plaintiff cannot recover. *McKiernan v. Valleau*, 51 Atl. Rep. 102 (R. I.).

The court apparently assumed that the *quasi*-contractual action would be governed by the principles of agency in the same way as an action on the contract. But under this assumption it seems difficult to support the decision, for the defendant could not deny that payment to an agent, whose apparent authority to deal with the land was unlimited, would extinguish, *pro tanto*, the contractual liability. *Stebbins v. Walker*, 46 Mich. 5; *Blackburn v. Scholes*, 2 Camp. 341, 343. It should be remembered, however, that *quasi*-contractual liability depends solely upon unjust enrichment of the defendant at the plaintiff's expense. *National Trust Co. v. Gleason*, 77 N. Y. 400; see 15 HARV. L. REV. 677. It is equitable in its nature and the rules of agency should be applied only when leading to equitable results. In the principal case it would seem, therefore, that the defendant is rightly protected, since he never received the money and did not induce the payment. The agent, of course, would be liable *quasi*-contractually. *Newell v. Tomlinson*, L. R. 6 C. P. 405. If, however, the principal's existence had been known to the purchaser, the *quasi*-contractual action could have been maintained. *Cary v. Webster*, 1 Str. 480. In such a case the ordinary doctrine that payment to the agent is payment to the principal yields equitable results and is therefore properly applied. See *Matthews v. Haydon*, 2 Esp. 509.

**SALES—WAREHOUSE RECEIPTS—PRIORITY.**—A warehouseman borrowed money from the defendant and gave as collateral security negotiable warehouse receipts for specified goods. Later the warehouseman issued other receipts for the same goods to the plaintiff. The defendant afterward renewed his receipts by delivering them up and receiving new ones in their stead. *Held*, that though the plaintiff's receipts were void by statute when issued to him, because other receipts were outstanding, yet the legal title to the goods attached to those receipts as soon as it was revested in the warehouseman by the return of the defendant's receipts for renewal, and the plaintiff thus became entitled to the goods. *Roche v. Crigler*, 67 S. W. Rep. 273 (Ky.).

The court relies on a previous case in which the first set of receipts was delivered

up absolutely, so that the holder of them retained no claim whatever on the goods. *Block v. Oliver*, 102 Ky. 269. It was there held that the legal title passed instantly to the holder of the previously invalid receipts. Such a doctrine presents technical difficulties; but the holder of the second set of receipts ought certainly to have full rights against the warehouseman, and to work out these rights by holding that he instantly gets legal title is a simple method, probably conforming with mercantile understanding and not open to serious practical objection. It should be recognized, however, that the doctrine seems supportable only on principles of justice and convenience and is to be extended with caution. In the principal case the receipts were delivered up on trust for an immediate reconveyance, and the entire beneficial interest, so far as required for his security, was retained by the defendant. Under such circumstances no rights in favor of the plaintiff, based on a claim not otherwise affecting the defendant, should be allowed to attach. *Cf. Eyre v. Burmeister*, 10 H. L. Cas. 90. The reissue to the defendant should, then, restore his legal title unimpaired.

**SALES — WARRANTY — WAIVER BY ACCEPTANCE.** — The defendant agreed to purchase a number of wooden tables, "to be properly set up and polished" by the plaintiff. Tables furnished under this contract were accepted by the defendant, and part of them were sold. In an action for the price, the defendant claimed that the above stipulation constituted a warranty, and counter-claimed for breach of it. *Held*, that by acceptance of the tables, he lost his right to damages under the warranty. *Albin Co. v. Kentucky Table Co.*, 67 S. W. Rep. 13 (Ky.).

In most states the buyer's right to sue for breach of warranty may survive an unconditional acceptance of the goods, even though the defect is easily discoverable at the time. *Underwood v. Wolf*, 131 Ill. 425. The jury may, however, find an implied agreement to compromise the claim by receiving the defective goods in satisfaction. See *Morse v. Moore*, 83 Me. 473, 481. On the other hand, some courts have adopted the view that acceptance always precludes any claim under the warranty. *Olson v. Mayer*, 56 Wis. 551. Although on principle damages should be recoverable for breach of contract in many of these cases, yet injustice would often result from allowing a buyer to recover after the goods are consumed and the seller's sources of evidence destroyed. Perhaps a wiser rule than either of those mentioned would make notice given by the buyer within reasonable time a condition of bringing action. In practice, however, the prevalent rule probably approaches this result, as judge and jury will naturally give considerable weight to a failure to give such notice, as evidence of bad faith.

**STATUTE OF LIMITATIONS — ADVERSE POSSESSION OF HIGHWAY.** — The defendant remained in adverse possession of a public street for the statutory period. Ejectment was brought by the city. *Held*, that the defendant has acquired title, and that the public easement is lost. *City of Hastings v. Gillitt*, 88 N. W. Rep. 987 (Minn.). See NOTES, p. 846.

**TAXATION — INHERITANCE TAX — WAR REVENUE ACT OF 1898.** — A Spanish subject died in Paris, leaving a will executed in Paris according to Spanish law. Under the will his son took one third of the testator's personal property, and the other two thirds descended to the son by the Spanish intestate law. At the time of his death, the testator owned bonds of American corporations, which were in the custody of his agents in New York. *Held*, that the passing of such bonds is not subject to the tax imposed by the War Revenue Act of 1898 upon "property passing by will or by the intestate laws of any state." *Eidman v. Martinez*, 22 Sup. Ct. Rep. 515.

A Frenchwoman, temporarily in New York, executed a will according to New York law, by which she bequeathed all her personal property to a daughter domiciled in Germany. The testatrix, at the time of her death in Switzerland, owned a chose in action against a New York firm, and stocks and bonds of American corporations. *Held*, that the passing of such property is not subject to the War Revenue Act tax. *Moore v. Ruckgaber*, 22 Sup. Ct. Rep. 521.

In general, the law of the owner's domicile regulates the devolution of personal property. *Dammert v. Osborne*, 141 N. Y. 564; *Ennis v. Smith*, 14 How. (U. S. Sup. Ct.) 400, 424. A succession tax on the privilege of taking may therefore be imposed there, wherever the property may actually be. *Matter of Estate of Swift*, 137 N. Y. 77, 88. It is also true that personal property within the jurisdiction may be

taxed, regardless of the owner's domicile. *Hoyt v. Commissioners*, 23 N. Y. 224; *New Orleans v. Stempel*, 175 U. S. 309. Accordingly the legislature may, by an explicit statute, tax the descent of such property. *Matter of Estate of Romaine*, 127 N. Y. 80. But the ordinary inheritance tax is properly construed as levied upon the devolution, as a privilege, and not upon the property itself. *United States v. Perkins*, 163 U. S. 625, 628; *Magoun v. Illinois, etc., Bank*, 170 U. S. 283, 288. Tax statutes are strictly construed, and cover only cases clearly included. *Wroughton v. Turtle*, 11 M. & W. 561, 567. On these principles, the Act of 1898 seems to tax the succession at the domicile and not the property where found. *United States v. Hunnewell*, 13 Fed. Rep. 617; *contra, Alvany v. Powell*, 2 Jones Eq. (N. C.) 51. It would have been easy to use words specifically including all property within the jurisdiction had such been the intention of Congress. See *Commonwealth v. Smith*, 5 Pa. St. 142; *Callahan v. Woodbridge*, 171 Mass. 595. The failure to do so, and the fact that property passing by intestate laws of foreign countries seems clearly outside the words of the act, reinforce the general considerations stated above and justify the decisions in the cases under discussion.

**TORTS — DEATH BY WRONGFUL ACT — DEATH NOT INSTANTANEOUS.** — The plaintiff's intestate sustained personal injuries through the negligence of the defendant, and several hours later died from these injuries. The plaintiff, as administratrix, brought the usual statutory action for his death. *Held*, that a right of action accrued to the intestate in the interval before his death, which by statute survives to his personal representative, and that in such cases the statute relating to death by wrongful act has no application. *Jones v. McMillan*, 88 N. W. Rep. 206 (Mich.). See NOTES, p. 854.

**TORTS — LIBEL — STATEMENT LIBELLOUS ONLY IN CONNECTION WITH FACTS UNKNOWN TO DEFENDANT.** — The defendant, a newspaper publisher, printed a notice stating that the plaintiff's wife had given birth to a child. The plaintiff had been married only a month, but of this fact the defendant was ignorant. The notice was untrue. *Held*, that the plaintiff has a cause of action. *Morrison v. Ritchie & Co.*, 39 Scot. L. Rep. 432; 112 L. T. 472.

Formerly a defendant was responsible only for publications libellous to his knowledge. *Dexter v. Spear*, 4 Mason (U. S. Circ. Ct.) 115; *Smith v. Ashley*, 11 Met. (Mass.) 367. But on grounds of sound public policy, the law now requires a defendant to know at his peril the usual construction and implication of his words. See *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 299; ODGERS, LECTURES ON LIBEL, 74. Liability, therefore, is now extended to the intentional or negligent publication of all matter libellous in itself. *Vinetelly v. Mudie's Select Library*, [1900] 2 Q. B. 170. But where, as in the principal case, the words themselves have no libellous sense, but are rendered defamatory only in connection with existing facts known to readers, this rule of policy is not involved. In this class of cases, if a defendant knows the additional facts, he should clearly be responsible on the ground of intentional defamation. See ODGERS, LIBEL AND SLANDER, 3d ed., 120. But if he is ignorant of the facts, it seems just that he should be liable only if his lack of knowledge was occasioned by negligence. See *Capital, etc., Bank v. Henty*, 7 App. Cas. 741, 771; *cf. Hanson v. Globe Newspaper Co., supra*. Such a doctrine would be in accord with the usual principles of liability in tort. The decision in the principal case, which intimates that the defendant should be liable regardless of negligence, seems unnecessarily to extend the absolute liability for the defamatory effect of the words published, which is imposed by the rule of policy above mentioned.

## BOOKS AND PERIODICALS.

MEASURE OF REINSURER'S LIABILITY. — It may be laid down broadly that a contract of insurance is a contract to indemnify for actual damage suffered. Reinsurance, on the other hand, has been considered as a contract of 'indemnity for liability,' not for actual loss. EMERIGON, Meredith's ed., 1850, ch. 8, § 14; 1 JOYCE, INS., § 134; *Hone v. Mutual, etc., Ins. Co.*, 1 Sandf. 137. This doctrine has been supported in a recently published article which states that "the measure of [the reinsurer's] indemnity payment is the insurer's liability at the time of such payment." *The Contract of Reinsurance*, by W. R. Vance, 7 Va. L. Reg. 669 (Feb. 1902). Although this proposition is almost universally accepted it has been contended, not without some show of reason, that reinsurance as well as simple insurance is essentially indemnity, and that the reinsurer therefore should have to pay to the insurer only his actual pecuniary loss. If this latter rule be applied to cases where the insurer has become bankrupt it is evident that, on payment of a dividend to the insured by the bankrupt, a valid claim for that amount arises against the reinsurer. When that amount is collected it becomes in turn an asset from which a dividend must be paid to the insured. Then consequently another claim arises against the reinsurer, and so on *ad infinitum*. See *Philadelphia, etc., Ins. Co. v. Fame Ins. Co.*, 9 Phila. 292.

To avoid the necessity — under the 'indemnity for loss' theory — of successive settlements or calculations, a formula, the principle of which has been suggested in certain suretyship cases, might prove useful.

Let  $a$  = total liabilities of the bankrupt insurer.

$b$  = his liability to the insured whose risk has been reinsured.

$c$  = assets of the insurer exclusive of his claim upon the reinsurer.

Then  $\frac{b}{a}$  = proportion of assets due insured on each distribution, and  $(\frac{b}{a})c$  = amount due insured on the first distribution and therefore the amount for which the insurer has a claim upon the reinsurer. Of this sum the insured should receive his proportionate part, which is  $\frac{b^2c}{a^2}$ . This in turn gives rise to a further claim upon the reinsurer. Hence, the series representing the final amount which the insured should receive from, and which the reinsurer should pay to, the insurer, is the geometrical progression  $\frac{bc}{a} + \frac{b^2c}{a^2} + \frac{b^3c}{a^3}$  etc. The sum of this progression is represented by the formula  $S = \frac{bc}{a-b}$ . For example, if  $a = \$100,000$ ,  $b = \$10,000$ , and  $c = \$50,000$ , then the reinsurer's liability would be  $\frac{10,000 \times 50,000}{100,000 - 10,000}$ , which resolves into \$5555.56. Cf. 14 HARV. L. REV. 547.

If reinsurance means indemnity for actual pecuniary damage, unquestionably the above formula works out exact and immediate justice. But if reinsurance means liability to pay to the insurer the whole claim of the insured, irrespective of the insurer's ability to pay that claim in full, clearly the formula is inapplicable. Which of these views is preferable in a particular case is largely a question of interpretation. If the parties intended the insurer to get back only what he paid out, and if his only motive was to prevent loss to himself, the former view must be correct. If, on the other hand, they intended the reinsurer to become liable for the full amount from the moment of loss, and if the insurer reinsured chiefly to strengthen his financial position, then the latter doctrine should prevail. Legal analogies favor the one; the courts have accepted the other.



**CRIME IN ITS RELATION TO SOCIAL PROGRESS.** By Arthur Cleveland Hall. New York: The Columbia University Press. The Macmillan Co., Agents. London: P. S. King & Son. 1902. pp. xvii, 427. 8vo.

The main thesis of this book is, that the apparent increase in convictions for crime in some of the most advanced nations during the last century is not a sign of decadence. One would think that a book as big as this would not be necessary to prove anything so self-evident. The creation of novel, petty crimes and the more certain detection and punishment of older crimes much more than account for the apparent increase. When we find a court with its jurisdiction nearly constant and study its records during the century we find quite another story. In the Old Bailey and the Central Criminal Court of London, for instance, with a not greatly increased jurisdiction or tale of crimes, the number of prosecutions enormously decreased during the nineteenth century.

But the science of criminology cannot, it appears, be established by so simple a method as by the statement of axioms and the test of these axioms by the facts. Through devious paths the way is most satisfactory. And Doctor Hall's method of proving his axiom is devious enough. The steps are as follows:—

1. "Crime is any act or omission to act *punished by* society as a wrong against itself" (p. 10). "If forbidden and punishable by law, but not actually punished, the act is not an abstract crime." "It is necessary always to remember that no action is a crime unless society actually punishes it as a wrong against itself. No amount of legal prohibition will suffice, unless the laws are enforced" (p. 277). "Piracy was not a crime at the beginning of the eighteenth century, for it was not punished to any extent, and successful pirates were greatly admired by the lower classes" (p. 257). "The laws remained dead letters, and consequently the acts they were directed against were not crimes" (p. 193). "Crime ceases to be punished. Crime ceases to be crime" (p. 153).

2. Having assumed this unique meaning for the word crime, it follows that where there are few crimes the nation is either so torn with war and anarchy that it cannot feel the pin-pricks of mere transgression, or else it is so weak as not to be able to resent and punish.

3. Consequently an increase of crime indicates an awakening to faults and the power of redressing them.

4. Finally, since crime is greatly increasing in modern civilization, we are advancing, not decadent.

A weak point here is, that the "crime" which according to Doctor Hall is increasing, is crime not in his sense but in the ordinary sense—acts punishable by the law.

This book shows many excellent qualities; industry, clearness and firmness of purpose, patience in the development of the theme, and intelligent optimism. It is marred by the faults pointed out: a fundamental misuse of the principal word of its title (leading finally to confusion), and a labored attempt to prove that progress progresses. This may indicate imperfect mastery of the facts, or immature judgment. In either case, the book might be fundamentally improved in a second edition.

J. H. B.

**A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY.** By Emory Washburn, Bussey Professor of Law in Harvard University. Sixth Edition by John Wurts, Professor of the Law of Real Property in the Yale Law School. 3 vols. Boston: Little, Brown, & Co. 1902. pp. clxx, 579; iv, 706; iv, 636. 8vo.

"The training of a lawyer should not only enable him to perceive and understand abstract truths in detail, but to contemplate them in their relations and bearings to each other, so as, out of them, to elicit new truths, and, in this way, to grasp and comprehend the problems of law and government with which he will have to engage." So spoke Professor Washburn in his closing address to the students of the Harvard Law School, in 1876. In the same spirit he had, in

1860, written the two original volumes on the Law of Real Property. His broad grasp of the entire subject and his clear and easy style produced a work which remains to-day the most comprehensive general treatise on this large and important branch of the law.

The first three editions appeared at intervals of four years. Since then, the periods between successive editions have gradually increased, largely owing to the multiplication of books on special topics embraced under this title, but Professor Washburn's work is still the standard treatise on the subject. Its retention of this position is, however, due in no small measure to the fortunate selection of its editors and annotators. In the sixth edition, especially, do the labors of the editor add to the value of the volumes. Professor Wurts has not only brought down to date the references to authorities, but has made many changes in the text, chiefly by way of addition and enlargement. These changes have been in complete sympathy with the method and manner of the original. Often, in the light of the increased number of cases decided since Professor Washburn wrote, Professor Wurts is enabled to deduce a definition or a principle of law, where before there had been stated only a decision on a single set of facts. The subject of Fixtures offers many such opportunities. On the other hand, former editors had expanded largely the discussion of the topic of "Homestead Rights;" the sixth edition wisely follows the general scope of the original, and reduces this chapter about one hundred pages.

In view of the excellence of the editorial work, it may be permissible to doubt the advisability of a merely mechanical change, namely, the omission of the paging of the first edition. Verification of references to or from other editions thus becomes extremely difficult.

J. L. W.

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LECTURES ON SLAVONIC LAW. By Feodor Sigel. London: Henry Frowde. New York: Oxford University Press, American Branch. 1902. pp. viii, 152. 12mo.

This little book contains the Ilchester Lectures for the year 1900, by Professor Sigel of the faculty of law in the University of Warsaw. These consist of a careful historical examination of the fortunes of folk-law in the Slavonic nations of Europe. Separate lectures are devoted to Bulgaria and Servia, Russia, Bohemia, Poland, and Croatia.

The title given to the book is a trifle misleading. While the greater part of the lectures tells about the Slavonic law and its fortunes in various Slavonic states, there is hardly a word to indicate what the actual provisions of that law were; neither are the principles of Slavonic law stated, nor is any comparison made between these principles and those of other Aryan systems of law. One who goes to the book, therefore, to find out what the peculiar doctrines of Slavonic lawgivers were will be disappointed. On the other hand, there is a careful, concise, and, on the whole, clear discussion of the external history of the popular law, its crystallization into more or less perfect codes in the different states, and its final absorption into the all-conquering Roman law. We get a good general idea of the constitutional history of these countries, and some information on their legal bibliography. This information is so interesting and so valuable that one hardly feels like finding fault with the book for not containing what its title seems to import.

To an English lawyer much the most interesting part of this book is the lecture on the law of Bohemia. The King of Bohemia, like the King of England, succeeded in establishing a King's Court which absorbed into itself the functions of the earlier popular courts. Like the King's Court in England, this court proceeded to apply throughout Bohemia a common law, based largely, of course, on doctrines of Slavonic law, but modifying those doctrines by notions of equity and of public policy. Again like the English court, the Bohemian court proceeded from precedent to precedent, and thus established a body of common law that was sensible, flexible, and perfectly adapted to its purpose. Unfortunately this Bohemian common law was entirely superseded at the time

the country became Germanized; but the reports of the decisions of the King's Court have been preserved, and a study of them should be of the greatest value to a student of our own legal history.

J. H. B.

**ELEMENTS OF THE LAW OF BAILMENTS AND CARRIERS**, including Pledge and Pawn and Innkeepers. By Philip T. Van Zile. Chicago: Callaghan & Co. 1902. pp. lvii, 785. 8vo.

This is an especially interesting book. The law of bailments and the allied subjects here treated has, as its foundation, principles which are as old as civilization, but which in spite of their primitive origin still persist as governing rules for our modern complex business system. This phase of the subject is given prominence by the work, and the flexibility and adaptability of our common law are thus excellently illustrated.

The writer first treats bailment in general, outlining the history, nature, and classification of the relation, and thus indicating with clearness and discrimination the rights and liabilities incident to the relation in each of the general classes. The succeeding portion of the book deals with the more specialized forms of bailments and related subjects under the titles of Pledge or Pawn, Innkeepers and Boarding-house Keepers, Carriers, and Carriers of Passengers. The section on pledge is particularly good in its treatment of the pledge of negotiable and non-negotiable securities. That on innkeepers brings into accessible form peculiar and not unimportant principles of law not often so fully treated. Fully half of the book is devoted to the law of carriers, and this important branch is carefully and thoroughly analyzed in its many complex details and modern applications. There is also a brief section on the Post-office Department and the liability of its servants.

The book is not, and does not purport to be, a work of originality. It merely restates in clear, concise, and well digested form old well established principles together with those that are still in the process of development. This is done in a free, sketchy style which shows the effect of the author's long experience as a lecturer and adds not a little to the value and attractiveness of the volume, especially as it is likely to prove particularly a student's book. It will nevertheless become a valuable hand-book for practitioners from its concise analysis of an important subject. While not a great book, or an especially noteworthy accession to legal literature, this work is distinctly commendable.

W. H. H.

**THE LAW OF INSURANCE — FIRE, LIFE, ACCIDENT, GUARANTEE.** By William A. Kerr. St. Paul: Keefe-Davidson Co. 1902. pp. xi, 917. 8vo.

The author of this book has attempted to give a concise statement of the law of non-maritime insurance as laid down by the courts in decided cases. In brief, he has prepared a large number of head-notes which have been classified and arranged under appropriate divisions and subdivisions of the subject. In support of each proposition the corresponding authority is cited. Mr. Kerr frankly states that his aim has been merely to provide a convenient aid and guide to investigation of the actual state of the law. He has no theories to advance and does not discuss the reasons which gave rise to the existing law, but is content to state what that law is and where it may be found. For this reason the work will be of little value to the student. On the other hand, it will probably find a ready welcome to the shelves of the busy practitioner.

S. L. C.

**THE NEGOTIABLE INSTRUMENTS LAW.** The full text of the law as enacted, with copious annotations. By John J. Crawford. Second edition. New York: Baker, Voorhis & Co. 1902. pp. xxxiv, 173. 8vo.

The second edition of Mr. Crawford's book follows closely upon the first edition of 1897, and, although only six decisions upon the Uniform Act have been handed down since that date, the author finds his excuse for a new edition in the needs of the lawyers of the fourteen states which have in the mean time adopted the Code. He devotes himself in this second edition to the task of making the work of local value in those states. His purpose is to point out changes made in the existing law by the Act and to give citations from the different jurisdictions. He does not, however, seem to be uniformly successful. Several instances can be found where marked changes in the existing law are not clearly pointed out, as where, for example, on page 64, in the section on irregular indorsers, the Massachusetts decisions are not included in the list of those which hold that an anomalous indorser is liable as a joint maker. Again the citation of authorities is often noticeably incomplete. The omissions are doubtless due to a desire for brevity, but they decrease the book's value to the practising lawyer who seeks a guide to the leading decisions in his state.

In this second edition, with its wider aim, there seems little excuse for retaining the peculiar, meaningless section numbering adopted in New York. There is a substantial uniformity among the states in this matter, but, as appears from the author's footnotes, none have adopted the New York system. The Index shows no improvement and is inadequate to the needs of those who use the book as a reference manual.

**A TREATISE ON THE LAW OF FRAUD AND MISTAKE.** By William Williamson Kerr. Third edition by Sydney E. Williams. London: Sweet & Maxwell, Limited. 1902. pp. lxxv, 557. 8vo.

Since the appearance of the second edition of this book in 1883, the law relating to fraud and mistake has undergone substantial development, and this further revision of a standard work cannot fail to be received with interest. Like the preceding edition it deals exclusively with the English law, no American cases being cited. The present volume is of about the same dimensions as the earlier; a considerable amount of new matter has been added and much that was obsolete has been wisely omitted, leaving a text forty pages shorter than that of 1883. The topical arrangement of the earlier work is retained with slight alterations and to a great extent the original form of statement is preserved.

The most extensive changes are found in the chapter on Misrepresentation and Concealment, necessitated principally by the important decision in *Derry v. Peek*, 14 A. C. 337, holding that negligent misrepresentation as distinguished from fraudulent misrepresentation will not ground an action of deceit. Unfortunately here where most is hoped for, the work seems most deficient. While Mr. Williams may be quite right in attacking the doctrine of *Derry v. Peek*, the question is but little clarified by a treatment consisting largely of the comments of judges and presenting only a brief and unanalytical statement of the editor's own views. That the House of Lords may have been wrong in its interpretation of the facts Mr. Williams does not even intimate; and yet writers of no less authority than Sir Frederick Pollock and Sir William R. Anson agree in so thinking. 5 L. Quart. Rev. 410, 422; 6 L. Quart. Rev. 72, 73. Again, in attempting to reconcile *Derry v. Peek* with certain earlier cases which are generally regarded as having been overruled by it, the editor's argument is far from convincing.

A similar want of close analysis and correct appreciation is detected in other parts of the volume, as where the subject of the conditional revocation of wills is disposed of in a single paragraph; and where sanction is given to the questionable distinction taken by the English cases between an equity and an equi-

table estate. The important case of *Dodds v. Hills* is dismissed with a single sentence. Mr. Williams cites it as a case where an equitable mortgagee of shares of stock subject to a trust was allowed to prevail over the *cestui's* prior equity although the mortgagee received notice of the trust before the transfer was registered on the books of the company; he fails to appreciate what seems to have been the true ground of decision, namely, that to secure registration no further act of the fraudulent trustee was necessary.

The style of the work is generally clear and succinct. One finds, however, an occasional awkward sentence, as "the expression 'legal fraud' has often been taken exception to;" or "which the defendant knows to be untrue or is indifferent as to its truth."

But whatever may be the deficiencies occasionally noted, the book as a whole is not without clear merit. Numerous cases have been added to the citations and the index has been revised and enlarged. The value of the work as a book of reference will be permanent.

ESSAYS IN LEGAL ETHICS. By George W. Warvelle. Chicago: Callaghan & Co. 1902. pp. xiii, 234. 12mo.

This book is made up of a series of lectures given by the author to his classes in the Chicago Law School. It has the faults common to most books on the subject, being chiefly an enumeration of the rules of conduct ordinarily recognized and followed by the better class of lawyers, with very little that is illuminating or satisfactory in the way of comment or explanation. So far as these rules are based on the more or less artificial but generally admirable standard of professional dignity, which lawyers themselves have by long precedent established, even a bare enumeration is instructive to the student. Moreover, most of the situations presenting problems of professional conduct which recur frequently in the experience of practitioners are treated, so that a perusal of the book at least calls these situations to the mind of the reader, and if he be at once thoughtful and inexperienced the reading may lead to some helpful meditation upon their moral aspects. Beyond this little can be said. No mere book of rules can solve the more difficult moral problems of the lawyer, and only a treatment of the underlying principles, at once scholarly, discerning, and sensible, could be in itself of great value in preparing the lawyer for the responsibilities of his profession. The present volume, even where there is an attempt to explain the basis of the rules, approaches this standard very remotely, supporting sound rules with reasoning often inconclusive and sometimes manifestly unsound. The style is generally clear and direct, but there is a lack of perspective and subordination, and the use of English is occasionally somewhat barbarous.

COMMENTARIES ON THE LAW OF NEGLIGENCE. By Seymour D. Thompson. In six volumes. Vol. III. pp. xl, viii, 1118. Indianapolis: The Bowen-Merrill Co. 1902. 8vo.

This third volume of Judge Thompson's work on Negligence, the first two volumes of which were reviewed in 15 HARV. L. REV. 327 (Dec., 1901), is concerned entirely with the negligence of Carriers of Passengers. It includes a complete revision of the author's previous work on Carriers of Passengers, which consisted of selected cases with extensive notes. The long discussion of the general subject of passenger carriers with which the volume opens, although it seems to run beyond the proper scope of a book on negligence, is nevertheless excellent. But the examination of particular subjects which follows is too detailed. The reader's mind is confused by the profusion of quotations and brief statements of cases, and is not relieved by the suggestion of any underlying principle. The book may be heartily recommended, however, to the practising lawyer who wishes to find a case having certain given facts, or to look up the latest decisions, of which a vast number are cited.



**AMERICAN ELECTRICAL CASES**, being a Collection of Important Cases (excepting Patent Cases) decided in the State and Federal Courts of the United States from 1873 on Subjects relating to the Telegraph, the Telephone, Electric Light and Power, Electric Railway, and Other Practical Uses of Electricity, with Annotations. Edited by William W. Morrill. Vol. VII. 1897-1901. Albany: Matthew Bender. 1902. pp. xxiv, 940. 8vo.

This volume gathers in convenient and accessible form the more important of recent electrical decisions, exclusive of patent cases. Like the preceding volumes of the series it covers a wide range of decisions, many of them being reported in full, while others of minor consequence are briefly recorded in appropriate notes. The editor occasionally ventures a comment of his own, perhaps as frequently as one would expect in a subject that is so free from technicality and so largely a matter of sound sense.

It might well be thought that the practical efficiency of the work would be increased by a more thorough classification of the cases. As the book stands they are grouped under four divisions so general as to be of little value. No title, curiously, appears for Part I. That assigned to Part II. seems carelessly drawn, containing the somewhat puzzling words "Abutting Owners' and Other Private Rights."

Complete indexes to notes and cases are found in the present volume, covering all the volumes of the series that have thus far appeared. The work cannot fail to commend itself to those whose practice or study leads them into this growing field of the law.

**THE LAW OF VOID JUDICIAL SALES.** The Legal and Equitable Rights of Purchasers at Void Judicial, Execution, and Probate Sales, and the Constitutionality of Special Legislation validating Void Sales and authorizing Involuntary Sales, in the Absence of Judicial Proceedings. Fourth edition. By A. C. Freeman. St. Louis: Central Law Journal Company. 1902. pp. 341. 8vo.

**THE RIGHT TO AND THE CAUSE FOR ACTION**, both Civil and Criminal, at Law, in Equity, and Admiralty, under the Common Law and under the Codes. By Hiram L. Sibley, Circuit Judge in the Fourth Circuit of Ohio. Cincinnati: W. H. Anderson & Co. 1902. pp. x, 165. 8vo.

**THE LAW OF INTERPLEADER**, as administered by the English, Irish, American, Canadian, and Australian Courts, with an Appendix of Statutes. By Roderick James MacLennan. Toronto: The Carswell Company, Limited. London: Stevens & Sons, Limited. Boston: Boston Book Co. 1901. pp. xxix, 464. 8vo.

**A TREATISE ON THE LAW OF MASTER AND SERVANT**, including therein Masters and Workmen in Every Description of Trade and Occupation; with an Appendix of Statutes. By Charles Manley Smith. Fifth edition by Ernest Manley Smith. London: Sweet & Maxwell, Limited. 1902. pp. xcvi, 823. 8vo.

**VISUAL ECONOMICS**, with Rules for the Estimation of the Earning Ability after Injuries to the Eyes. By H. Magnus and H. V. Würdemann. Milwaukee: C. Porth. 1902. pp. 144. 8vo.

**SUMMARY AND INDEX OF LEGISLATION IN 1901.** N. Y. State Library Bulletin 69. Edited by Robert H. Whitten. Albany: University of the State of New York. 1901. pp. 815-1229. 8vo.

**REVIEW OF LEGISLATION, 1901.** N. Y. State Library Bulletin 72. Edited by Robert H. Whitten. Albany: University of the State of New York. 1902. pp. 248. 8vo.

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